

IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 11 and 197

IGOR A. IVANOV AND JOHN WILLIAM BUTENKO, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

Relevant Docket Entries in District Court

- 11- 8-63 Indictment for conspiring to transmit to a foreign government information relating to national defense of the U. S. A.; conspiring to commit offenses against the United States by acting in the United States as an agent of a foreign government; unlawfully acting as an agent of a foreign government filed 11-7-63.
- 11- 8-63 Notice of Allocation filed. (Newark).
- 11-19-63 John William Butenko—Plea—Not Guilty. (Meaney) (11-15-63).
- 11-19-63 John William Butenko—Ordered renewed application for bail denied. (Meaney) (11-15-63).
- 11-19-63 Igor A. Ivanov—Plea—Not Guilty. (Meaney) (11-15-63).
- 11-19-63 Igor A. Ivanov—Ordered renewed application for bail denied. (Meaney) (11-15-63).
- 11-19-63 Igor A. Ivanov—Notice of Appearance filed 11-15-63.
- 12-16-63 Notice of Motion of John William Butenko for bill of particulars returnable 1-13-64 and statement in lieu of brief filed.
- 12-16-63 Notice of motion of John William Butenko for discovery and inspection returnable 1-13-64 and statement in lieu of brief filed.
- 12-23-63 Igor A. Ivanov—Certified copy of order of U. S. C. A. admitting defendant to bail pending appeal filed 12-20-63. (See Cr. 410-63).

Relevant Docket Entries in the District Court

12-26-63 John William Butenko—Certified copy of order of U. S. C. A. denying defendant's renewed application for bail filed. (See Cr. 410-63).

1-20-64 Hearing on motion of John William Butenko for bill of particulars. Ordered motion granted in part and denied in part. (Shaw) (1-17-64).

1-20-64 Hearing on motion of John William Butenko for discovery and inspection. Ordered motion granted. (Shaw) (1-17-64).

1-20-64 Hearing on motion of Igor A. Ivanov for bill of particulars. Ordered motion granted in part and denied in part. (Shaw) (1-17-64).

1-20-64 Hearing on application of Igor Ivanov for new trial date. Ordered application granted. (Shaw) (1-17-64).

1-22-64 Notice of Motion of John William Butenko for a judicial determination of mental competency of defendant, returnable 1-24-64 and acknowledgment of service filed 1-21-64. (No brief).

1-24-64 Transcript of hearings held 1-17-64 filed.

1-27-64 John W. Butenko—Notice of Appearance filed 1-24-64.

1-27-64 John W. Butenko—Hearing on motion for a judicial determination of the mental competency of defendant. Ordered motion granted. Order to be submitted. (Augelli) (1-24-64).

1-31-64 Hearing re retention of counsel for defendant John W. Butenko. Ordered defendant retain counsel. (Shaw) (1-30-64).

3- 5-64 Order of Assignment to Judge Augelli filed. (Madden).

Relevant Docket Entries in the District Court

- 3-23-64 Notice of motion of U. S. for appointment of counsel for John William Butenko and affidavit of service filed 3-20-64.
- 3-24-64 Transcript re hearing re retention of counsel for John W. Butenko filed 3-23-64.
- 3-26-64 Hearing on motion of U. S. for appointment of counsel for John W. Butenko. Ordered motion denied. (Augelli) (3-24-64).
- 4-22-64 Order granting motion of Igor A. Ivanov for discovery, etc., filed 4-21-64. (Shaw). Notice mailed.
- 4-24-64 John W. Butenko—Notice of Appearance filed 4-22-64.
- 4-24-64 Hearing on application to compel John W. Butenko to retain counsel. Defendant retained Raymond Brown as counsel. (Augelli) (4-22-64).
- 5- 1-64 Order granting motion of John W. Butenko for discovery filed 4-30-64. (Augelli). Notice mailed.
- 5- 1-64 Notice of motion of John W. Butenko to set aside Court's decision to order examination of defendant re mental competency, returnable 5-4-64 filed.
- 5- 6-64 Hearing on motion of John W. Butenko to set aside court's decision to order examination of defendant re mental competency. Ordered motion denied. (Augelli) (5-4-64).
- 5- 6-64 Order for examination of John Butenko re mental competency filed 5-4-64. (Augelli). Notice mailed.

Relevant Docket Entries in the District Court

5-19-64 Copy of order for examination of John Butenko re mental competency with Marshal's return thereon filed.

7-14-64 Notice of motion by John W. Butenko to suppress for use as evidence all documents, materials, paraphernalia and brief cases obtained by Federal Officers; to quash the arrest warrant; for permission to take depositions of Gleb A. Pavlov, Yuriy A. Romashin and Vladimir I. Olenov in the U. S. S. R. before a U. S. Counsellor, filed 7-13-64 (ret. 8-3-64) (No brief submitted).

7-17-64 Affidavit of John W. Butenko, filed 7-16-64.

8- 4-64 Hearing on motion of John W. Butenko to suppress evidence; to quash arrest warrant; for permission to take depositions of Gleb A. Pavlov, et als. Ordered motion granted in part and denied in part. Order to be submitted. (Augelli) (8-3-64).

8-4-64 John W. Butenko—Ordered defendant remanded to jail. (Augelli) (8-3-64).

8- 5-64 Affidavit of James Walter Johnson filed 8-4-64.

8- 5-64 Affidavit of Frederick V. Behrends filed 8-4-64.

8- 7-64 Order granting defendant's (Butenko) motion to take depositions of Yuri A. Romashin, Gleb A. Pavlov and Vladimir I. Olenov with certain conditions etc filed 8-6-64. (Augelli). Notice mailed.

8-11-64 Notice of Motion of Igor A. Ivanov to suppress evidence, returnable 8-14-64 and acknowledgment of service filed 8-10-64. (Brief submitted).

8-11-64 Notice of Motion of U. S. to strike defendant's motion to suppress evidence, returnable 8-14-64 and affidavit of service filed. (Brief sub.).

Relevant Docket Entries in the District Court

- 8-12-64 Transcript of hearing on motion to suppress evidence, etc., filed.
- 8-17-64 Hearing on motion of U. S. to strike Igor Ivanov's motion to suppress evidence. Order motion denied. (Augelli) (8-14-64).
- 8-17-64 Hearing on motion of Igor A. Ivanov to suppress evidence. Ordered hearing continued to 8-17-64. (Augelli) (8-14-64).
- 8-20-64 Continued hearing on motion of Igor A. Ivanov to suppress evidence. Ordered hearing continued to 8-18-64. (Augelli) (8-17-64).
- 8-20-64 Continued hearing on motion of Igor A. Ivanov to suppress evidence. Ordered motion denied. Order to be submitted. (Augelli) (8-18-64).
- 9-15-64 Order denying motion of Igor A. Ivanov to declare his arrest illegal and denying defendant's motion to suppress evidence filed 9-14-64. (Augelli). Notice mailed.
- 9-17-64 Transcript of hearing on motions heard Aug. 14, 17 and 18 filed 9-16-64.
- 10- 2-64 Notice of Motion of John W. Butenko for adjournment of trial date or for dismissal of indictment, returnable 10-5-64 filed. (No brief submitted).
- 10- 7-64 Hearing on applications of defendants to dismiss indictment. Decision reserved. (Augelli) (10-5-64).
- 10-13-64 Order directing U. S. to answer certain demands for particulars filed 10-9-64. (Shaw).
- 10-14-64 Trial moved before Hon. Anthony T. Augelli, Judge and Jury. (10-9-64).
- Continued hearing on defendant's motions for dismissal of indictment. Decision reserved.

Relevant Docket Entries in the District Court

10-14-64 to 10-20-64 Trial continued.

10-22-64 Trial continued. (10-20-64).

Ordered motion of John Butenko for mistrial denied.

10-23-64 Trial continued. (10-21-64).

10-23-64 Trial continued. (10-22-64).

Ordered motion of defendants to dismiss indictment denied.

10-26-64 to 11-4-64 Trial continued.

11-9-64 Trial continued. (11-5-64).

Hearing on motion of defendants to suppress evidence. Decision reserved.

11-9-64 Trial continued. (11-5-64).

Ordered motion of Igor A. Ivanov to suppress evidence denied.

Ordered motion of John Butenko to suppress evidence denied.

Ordered motion of John Butenko for mistrial denied.

11-9-64 to 11-17-64 Trial continued.

11-18-64 Trial continued. (11-16-64).

Ordered motions of defendants for mistrial denied.

11-19-64 Trial continued. (11-17-64).

Hearing on motion of John Butenko for judgment of acquittal as to count 1. Decision reserved.

Hearing on motions of Igor Ivanov for judgment of acquittal as to counts 1 and 2. Decision reserved.

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Hearing on motion of J. Butenko for judgment of acquittal as to counts 2 and 3. Ordered hearing continued to 11-18-64.

11-19-64 Trial continued. (11-18-64).

Continued hearing on motion of John Butenko for judgment of acquittal as to counts 2 and 3.

Ordered motion denied.

Ordered motion of Igor Ivanov for judgment of acquittal as to count-1 denied.

Ordered motion of Igor Ivanov for judgment of acquittal as to count 2 denied.

11-23-64 Trial continued. (11-19-64).

11-24-64 Trial continued. (11-20-64).

Hearing on motion of John Butenko for formal hearing on search and seizure re: certain evidence. Decision reserved.

11-25-64 Trial continued. (11-23-64).

Hearing on motion of John Butenko re illegal search and seizure.

Ordered hearing continued to 11-24-64.

11-25-64 Trial continued. (11-24-64).

Continued hearing on motion of John Butenko re illegal search and seizure. Decision reserved.

11-27-64 Trial continued. (11-25-64).

Ordered defendants' motion to suppress evidence re: illegal search and seizure, denied.

Ordered defendants' motion to dismiss indictment, denied.

Relevant Docket Entries in the District Court

11-30-64 Trial continued. (11-27-64).

12- 1-64 Trial continued. (12-30-64).

Hearing on motion of John Butenko to strike certain testimony and for a mis-trial. Decision reserved.

Hearing on motion of Igor Ivanov for a mis-trial. Decision reserved.

Hearing on renewed motion of John Butenko for judgment of acquittal on Counts 2 and 3: Decision reserved.

Hearing on motion of Igor Ivanov for judgment of acquittal on counts 1 and 2. Decision reserved.

12- 1-64 Order for payment to jurors for service in excess of thirty days at \$10.00 per day filed 11-30-64. (Augelli).

12- 3-64 Trial continued. (12- 1-64).

Ordered motion of John Butenko to strike certain testimony and for mis-trial denied.

Ordered motion for Igor Ivanov for mis-trial denied.

Ordered renewed motion of John Butenko for judgment of acquittal as to Counts 2 and 3 denied.

Ordered motion of Igor Ivanov for judgment of acquittal as to Counts 1 and 2 denied.

Ordered motion of John Butenko for mistrial denied.

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12- 4-64 Trial continued. (12- 2-64).

Verdict:

John Butenko—Guilty.

Igor Ivanov—Guilty.

Ordered bail continued as to Igor Ivanov.

Ordered John Butenko remanded to jail.

12- 4-64 Government's Requests to Charge filed 12- 2-64.

12- 4-64 Igor A. Ivanov—Requests to Charge filed 12- 2-64.

12- 4-64 John Butenko—Requests to Charge filed 12- 2-64.

12- 4-64 Igor A. Ivanov—Supplemental Requests to Charge
filed 12- 2-64.

12- 4-64 John Butenko—Supplementary Requests to
Charge filed 12- 2-64.

12- 4-64 Request of Jurors filed 12- 2-64.

12- 7-64 Transcript of hearing held 8- 3-64 filed 12- 4-64.

12- 8-64 Order impounding Exhibits G-40 through G-56(d)
filed 12- 7-64. (Augelli).

12-21-64 *John William Butenko—Sentence*: 30 years on
count 1; 5 years on count 2 and 5 years on count
3 to run concurrently. (Augelli) (12-18-64).

12-21-64 John William Butenko—Hearing on application to
fix bail pending appeal. Ordered application
denied. (Augelli) (12-18-64).

12-21-64 John William Butenko—Ordered defendant re-
manded to jail. (Augelli) (12-18-64).

Relevant Docket Entries in the District Court

- 12-21-64 Igor A. Ivanov—Sentence: 20 years on count 1 and 5 years on count 2, to run concurrently. (Augelli) (12-18-64).
- 12-21-64 Igor A. Ivanov—Hearing on application to fix bail pending appeal. Ordered application denied. (Augelli) (12-18-64).
- 12-21-64 Igor A. Ivanov—Ordered defendant remanded to jail. (Augelli) (12-18-64).
- 12-21-64 John William Butenko—Judgment and Commitment filed 12-18-64. (Augelli).
- 12-21-64 Igor A. Ivanov—Judgment and Commitment filed 12-18-64. (Augelli).
- 12-21-64 Igor A. Ivanov—Notice of Appeal filed 12-18-64.
- 12-21-64 Copies of notice of appeal sent to U. S. Attorney and Clerk, U. S. C. A.
- 12-28-64 Certified copy of Order of U. S. C. A. admitting Igor A. Ivanov to bail pending appeal filed 12-23-64.
- 12-28-64 John W. Butenko—Notice of Appeal filed 12-23-64.
- 12-28-64 Copies of notice of appeal sent to U. S. Attorney and Clerk, U. S. C. A.
- 1-19-65 Record on Appeal sent to U. S. C. A.
- 3-30-65 Transcript of hearing on defendants' motion to dismiss indictment filed.
- 3-30-65 Transcript of sentence as to both defendants filed.
- 3-30-65 Transcript of trial in 27 volumes filed.
- 3-31-65 Supplemental Record on Appeal sent to U. S. C. A.

*Relevant Dates Since 3-31-65***Relevant Dates Since 3-31-65**

- 6-17-66 Cause argued in Court of Appeals (Ganey & Smith, Circuit Judges; Kirkpatrick, District Judge).
- 10- 6-67 Judgment and opinion of Court of Appeals, affirming in part, reversing in part.
- 12- 5-67 Petitions for certiorari filed timely, pursuant to extensions granted by Mr. Justice Brennan, as No. 885 (Ivanov) and No. 1007, Misc. (Butenko), October Term 1967.
- 1-23-68 Motion to amend the petition for certiorari filed and served.
- 6-17-68 Motion to amend the petition and petition for certiorari granted. In forma pauperis granted as to petitioner Butenko.

*Indictment***Indictment**

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

JOHN WILLIAM BUTENKO and IGOR A. IVANOV.

Criminal Number 418-63

Title 18, U.S.C., Sections 794(c), 951 and 371

The Grand Jury in and for the District of New Jersey,
sitting at Newark, charges:

COUNT I

1. That from on or about April 21, 1963, and continuously thereafter up to and including the 29th day of October, 1963, in the District of New Jersey and elsewhere, John William Butenko and Igor A. Ivanov, the defendants herein, unlawfully, wilfully and knowingly did conspire and agree with each other and with Gleb A. Pavlov, Yuriy A. Romashin and Vladimir I. Olenov, co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to violate Subsection (a) of Section 794, Title 18, United States Code, in that they did unlawfully, wilfully and knowingly conspire and agree to communicate, deliver and transmit to a foreign government, to wit: the Union of Soviet Socialist Republics, and to representatives and agents thereof, directly and indirectly, information relating to the national defense of the United States of America and particularly information relating to the command and control system of the Strategic Air Command of the United States Air Force, with intent and reason to believe that the said information would be used to the advantage of a foreign nation, to wit: The Union of Soviet Socialist Republics.

Indictment

2. It was part of said conspiracy that the defendant John William Butenko would collect and obtain documents, writings and information relating to the national defense of the United States of America with intent and reason to believe that the said information would be used to the advantage of the said foreign nation, to wit: the Union of Soviet Socialist Republics.

3. It was further a part of said conspiracy that the defendants and co-conspirators would meet secretly for the purpose of transmitting documents, writings and information relating to the national defense of the United States of America.

4. It was further a part of said conspiracy that the defendants and the co-conspirators would use various and circuitous routes in arriving at their meeting places in order to conceal the true nature of their activities.

5. It was further a part of said conspiracy that the defendants and their co-conspirators would use a portable 35mm document-copy camera for the purpose of photographing and copying documents, writings and information relating to the national defense of the United States of America.

6. It was further a part of said conspiracy that the defendants and their co-conspirators would use a pocket size tone-modulated transmitter with companion pocket size receiver with which to further the ends of this conspiracy.

In pursuance and furtherance of the said conspiracy and to effect the object thereof, the defendants and their co-conspirators, did commit, among others, in the District of New Jersey and elsewhere the following:

OVERT ACTS

1. On or about April 21, 1963, the defendant John William Butenko met co-conspirator Gleb A. Pavlov at Closter, New Jersey.

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2. On or about April 21, 1963, the defendant Igor A. Ivanov traveled to the vicinity of Norwood, New Jersey, with co-conspirators Gleb A. Pavlov and Vladimir I. Olenov.

3. On or about May 26, 1963, the defendants, and co-conspirators Gleb A. Pavlov and Vladimir I. Olenov traveled to the vicinity of Closter, New Jersey.

4. On or about May 27, 1963, the defendant John William Butenko traveled to Ft. Lee, New Jersey.

5. On or about May 27, 1963, co-conspirator Gleb A. Pavlov traveled to Ft. Lee, New Jersey.

6. On or about September 24, 1963, the defendant John William Butenko met with co-conspirator Gleb A. Pavlov in Paramus, New Jersey.

7. On or about September 24, 1963, the defendant Igor A. Ivanov traveled to Paramus, New Jersey.

8. On or about October 29, 1963, the defendants and co-conspirators Gleb A. Pavlov and Yuriy A. Romashin traveled to Englewood, New Jersey.

In violation of Title 18, United States Code, Section 794 (c).

COUNT II

The Grand Jury further charges:

1. That from on or about April 21, 1963, and continuously thereafter up to and including October 29, 1963, in the District of New Jersey and elsewhere, John William Butenko and Igor A. Ivanov, the defendants herein, did unlawfully, wilfully and knowingly conspire and agree with each other and with Gleb A. Pavlov, Vladimir I. Olenov and Yuriy A. Romashin, co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to commit offenses against the United States, to wit: to violate Title 18, United States Code, Section 951.

2. It was part of said conspiracy that the defendant John William Butenko, not being a diplomatic and consular officer or attache, unlawfully, wilfully and knowingly would act in the United States as an agent of a foreign government, to wit: the Union of Soviet Socialist Republics, without prior notification to the Secretary of State.

3. It was further a part of said conspiracy that the defendant Igor A. Ivanov and the co-conspirators Gleb A. Pavlov, Vladimir I. Olenov and Yuriy A. Romashin, unlawfully, wilfully and knowingly would aid, abet, command, induce and procure the defendant John William Butenko, not being a diplomatic and consular officer or attache, unlawfully, wilfully and knowingly to act in the United States as an agent of a foreign government, to wit: the Union of Soviet Socialist Republics, without prior notification to the Secretary of State.

In furtherance of said conspiracy and to effect the object thereof, the defendants and co-conspirators did commit among others in the District of New Jersey and elsewhere the following:

OVERT ACTS

The Grand Jury repeats and realleges Overt Acts 1 through 8 alleged in the First Count of this Indictment as though fully set forth herein.

In violation of Title 18, United States Code, Section 371.

COUNT III

The Grand Jury further charges:

That from on or about April 21, 1963, to on or about October 29, 1963, in the District of New Jersey, John William Butenko, a defendant herein, unlawfully, wilfully and knowingly did then and there act as an agent of a foreign government, to wit: the government of the Union of Soviet

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Socialist Republics, without prior notification to the Secretary of State of the United States of America, the said defendant John William Butenko then and there not being a diplomatic or consular official or attache.

In violation of Title 18, United States Code, Section 951.

A TRUE BILL.

/s/ Edward M. Barnes

Foreman

/s/ DAVID M. SATZ, JR.

David M. Satz, Jr.

United States Attorney

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15170 AND 15232

UNITED STATES OF AMERICA

v.

JOHN WILLIAM BUTENKO AND IGOR A. IVANOV, *Appellants*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Argued June 17, 1966

Before: GANEY and SMITH, *Circuit Judges*, and
KIRKPATRICK, *District Judge*.

Opinion of the Court

(384 F.2d 554)

.(Filed October 6, 1967)

By GANEY, *Circuit Judge*.

Opinion Below

The appellants, John William Butenko and Igor A. Ivanov, were indicted by a federal grand jury in Newark, New Jersey, in a bill of indictment containing three counts. Count I charged conspiracy to violate the provisions of 18 U.S.C. §794(a) and (c),¹ count II charged conspiracy to violate the provisions of 18 U.S.C. § 951,² and count III alleged a substantive violation against John W. Butenko alone in violation of 18 U.S.C. § 951. Both defendants were found guilty on all counts by a jury and sentenced to the custody of the Attorney General, Butenko for thirty years and Ivanov for twenty years on count I, both were given five years on count II and on count III Butenko was given

¹ These subsections read as follows: "§ 794. Gathering or delivering defense information to aid foreign government.

"(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

* * * * *

"(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. * * *"

² This section reads as follows: "Agents of foreign governments

"Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

* * * "

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a sentence of ten years, the sentences on counts II and III to run concurrently with those imposed on count I. From these judgments, appeals were taken to this court and the matter is now before us for disposition as the court permitted the government's motion to consolidate the appeals of both defendants.

Under count I, a conspiracy was charged alleging an agreement among John W. Butenko and Igor A. Ivanov, as defendants, and Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, as co-conspirators, but not named as defendants, to unlawfully and knowingly conspire and agree to communicate and transmit to the Union of Soviet Socialist Republics, hereafter referred to as "U.S.S.R.", information relating to the national defense of the United States and, more specifically, information relating to the command and control system of the Strategic Air Command of the United States Air Force. It was further alleged that this activity was done with the intent and reason to believe that the said information would be used to the advantage of the U.S.S.R. The time within which the said conspiracy continued was from April 21, 1963, up to and including October 29, 1963.

The second count of the indictment charged Butenko and Ivanov, as defendants, and Pavlov, Olenov and Romashin, as co-conspirators, though not defendants, with conspiracy to violate 18 U.S.C. § 951. It alleged that John W. Butenko, not a diplomat or consular official or cultural attache, unlawfully and knowingly acted in the United States as an agent of the U.S.S.R. without prior notification of the Secretary of State of the United States, and that defendant, Igor A. Ivanov, and co-conspirators, Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, unlawfully and knowingly did aid and abet and induce John W. Butenko to so act.

The third count charged John W. Butenko alone with unlawfully and knowingly acting as an agent of the U.S.S.R.

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without notification to the Secretary of State of the United States and not then being a diplomat or consular official or cultural attache, with violation of 18 U.S.C. § 951.

The pertinent facts, for background, upon which the government relied for the conviction of the two defendants, as developed at the trial, are as follows: John W. Butenko, defendant, and American by birth, was an employe of the International Electronic Company, which is a subsidiary of International Telephone and Telegraph, and it was under contract with the United States Air Force to produce a command and control system for the Strategic Air Command. The project was given the name "465-L" and was an automatic electronic system which enabled the commander of the Strategic Air Command to alert and execute all his forces, at an extremely rapid rate to develop and plan his alternatives of operation and to give up to the minute status of the total force. Part of the operation of 465-L was the data transmission sub-system, whose function it was to permit rapid communication between Strategic Air Command headquarters and the various United States Air Force bases and missile sites. The four Strategic Air Command headquarter sites were located at Offutt Air Base, Nebraska; Westover Air Base, Massachusetts; Barksdale Air Base, Louisiana and March Air Base, California. It enabled the Strategic Air Commander to communicate with his bases at the speed of light. The operational breakdown of 465-L was divided into five sections, one of which was the field operations division, and defendant, John W. Butenko, was the Control Administrator for the same. It was the responsibility of the field operations division, and accordingly his, to check on installations and requirements at the various air and missile bases and handle arrangements with the United States Air Force for the actual installation, training of Air Force personnel, spare parts provisioning, as well as taking care of maintenance and handling general administrative duties. He ap-

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plied for and was given top secret clearance which gave him access to documents of top secret, confidential and unclassified nature, as he could secure them on a need-to-know basis.

From July, 1961, to July, 1963, Butenko received monthly reports updating necessary information concerning current specifications required for the 465-L program which set out the title, general subject matter, document classifications and specification numbers. The public did not have general access to the plant where Butenko was employed at Paramus, New Jersey, and the dissemination of the information concerning 465-L covered secret, confidential and unclassified information and even though some was unclassified, it could not be divulged to the general public unless permission from the Department of Defense and the Air Force was received. The contract between the Air Force and the Company was classified because parts of it were secret and top secret which made it a classified contract. The record discloses that all employees were made aware of the security requirements and were provided with a copy of the security manual which the defendant, Butenko, confirmed he had received.

The basis for the government's proof under the indictment was based largely on surveillance of the defendants and the co-conspirators by agents of the Federal Bureau of Investigation on April 21, 1963, May 26 and 27, 1963, September 23 and 24, 1963, and October 29, 1963.

Since the major contentions of the appellants, both at argument and in their briefs, was that the evidence offered by the government was insufficient to support the averments in the indictment, and accordingly their convictions, it becomes necessary to recite in some detail much of the government's proof.

On April 21, 1963, the evidence showed that the three agents of the Federal Bureau of Investigation conducted

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the surveillance, each testifying, sometimes piecemeal, as to the defendants' conduct, as one agent would have to break off surveillance and it would have to be taken up by another one, at a different position because of Soviet counter-surveillance, and the following was established: At 6:00 p. m., Agent Birch was in the Northvale, New Jersey area and took notice of a 1962 bluish-green station wagon, New York license plate No. 2N3078, with three Russian nationals seated therein, Igor A. Ivanov and Vladimir I. Olenev seated in the front seat with Gleb Pavlov, who was driving. He kept the station wagon under surveillance until it stopped at a restaurant, Lou's Hitching Post, in Closter, New Jersey, and defendant, Ivanov, and Olenev left the station wagon to enter the restaurant, and they were observed sitting together at a table for some time. The agent then noticed the station wagon for some twenty minutes making a series of turns in the area and a little later noticed it with Pavlov at the wheel on the shoulder of Piermont Road in Closter, New Jersey, at a point opposite the China Chalet Restaurant, which is in the area, and, almost at the same time, he noticed a 1961 Ford Falcon, four-door, turning from the road into and through the parking lot of the China Chalet Restaurant. This car was driven by John Butenko and the agent was able to read the license plate as New Jersey AVV871. At this point another agent picked up the surveillance and testified that a few minutes after the four-door Falcon sedan went into and through the parking lot of the China Chalet Restaurant, he observed the station wagon driven by Pavlov entering the parking lot of the nearby Finast supermarket. Through binoculars, he observed Pavlov leaving the station wagon and walking about twenty-five feet to the Ford Falcon, bearing license No. AVV871, which had already arrived there, and sat down in the front seat of the Falcon beside Butenko who was in the car when Pavlov entered the lot. They both sat in the front seat, talked for a short

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period of time and then Pavlov left the Falcon, this time carrying a light tan attache case. He then walked back of the station wagon with the attache case, re-entered it and drove out of the parking lot. When he entered the Falcon he had nothing in his hand whatsoever. The Soviet station wagon then proceeded to the lot of Lou's Hitching Post restaurant to Ivanov and Olenov, where, on two different occasions, they were seen dining together and several minutes later surveillance disclosed Ivanov and Olenov no longer in Lou's Hitching Post restaurant and also that the Soviet station wagon was not in the parking lot. The agent then saw Butenko, about ten minutes later, leave the Falcon in the Finast parking lot and walk for a few minutes to Piermont Road and then walk back to the Falcon and re-enter it. After about eight minutes more, Butenko again left the Falcon, walked slowly across the parking lot to Piermont Road where he met Pavlov and then walked out of his sight on Piermont Road, and Pavlov was not carrying an attache case. Some ten or fifteen minutes later, Pavlov and Butenko were seated together in Angelo's Closter Manor Restaurant, having dinner and conversing, and about fifty minutes later, the agent observed them paying the check and both Pavlov and Butenko left the restaurant and walked to Piermont Road, at which time surveillance was broken off. Butenko later admitted he had a tan attache case when he left home that evening but denied passing it to Pavlov.

On May 26, 1963, Agents Broderick, Mulvaney, McDougall, James, Conway and Ness, all of whom provided the testimony, observed the same Chevrolet station wagon driving back and forth past the Finast parking lot where Pavlov and Butenko had met on the night of April 21st. Ivanov was driving it with Olenov in the front seat and Pavlov in the rear. This unusual tactic was repeated three or four times. Earlier that evening, at about 5:15 p. m., Butenko was observed leaving his home in Orange, New

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Jersey, carrying a tan attache case and entering his car. He was observed driving from Orange, New Jersey, to Closter, New Jersey, where he arrived about 6:00 p. m., and a few minutes after he had parked his car on the Finast lot, the station wagon, now occupied only by Pavlov, entered the parking lot and then drove out, followed immediately by Butenko who proceeded to follow the station wagon. At 7:05 p. m., Pavlov and Butenko drove past the Old Hook Inn where Olenov and Ivanov, the defendant, were seen standing by the side of the road in front of the Inn. Some fifteen minutes later, Pavlov was observed driving into the parking lot of the Inn, picking up Olenov and Ivanov and, after some conversation, the three men drove out of the lot. Later, at about 8:00 p. m., Butenko's car was observed in the parking lot of the Florentine Gardens restaurant which is about an hour's drive from the Old Hook Inn in the direction of Westwood, New Jersey, and Butenko could be observed in the bar until about 10:00 p. m. During this time he was seen leaving the restaurant on various occasions, going out to his car, opening the doors, looking in the front and back seats, as well as opening the trunk and feeling inside it. Finally, he entered his car and drove toward Orange, New Jersey, when observation was broken off. When Butenko testified in his own defense, he explained that his frequent trips to the car were made in an effort to find some lozenges.

It is submitted here that his conduct was conspiratorial and that surveillance rendered any passing of information impossible but which was accomplished the next day as here shown on May 27th.

The surveillance on May 27, 1963, was done by four agents of the F.B.I. At 3:45 p. m., Pavlov left the United Nations headquarters of the Soviet mission in New York, carrying a reddish-brown briefcase, tapered from bottom to top and accordion-like. A few minutes later, Ivanov was observed leaving the same building. At 5:45 p. m., Bu-

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tenko left his work and drove to the Fort Lee area of New Jersey, and at approximately 8:00 p. m., Pavlov was seen standing next to a blue Falcon car bearing Butenko's license number, talking to a single individual sitting in the driver's seat of the blue Falcon. A half hour later, Butenko parked his car in the rear of 366 Park Avenue, Orange, New Jersey, near his home, and got out carrying a tan, reddish-brown brief case, accordion-like and tapered from bottom to top. In his defense, he acknowledged coming home that evening with such a briefcase.

On the date of September 23rd, surveillance disclosed that Butenko came to an area described on exhibit G-19, which is in or near Ridgewood, New Jersey, and also set out in exhibit G-30, later adverted to, and went up and down various streets making U-turns and following a circuitous pattern in a very unusual manner. The route taken on this day was described as a "dry-run". On September 24th, he took essentially the same route as that taken on September 23rd, with some minor deviations, and finally parked beside the Gold Key restaurant in the northern New Jersey area for some ten or fifteen minutes. During this time Pavlov and Romashin were standing across the road at a shopping center, looking in the direction of the Gold Key. About 8:20 p. m., the Falcon, with Butenko, left the Gold Key and drove south on Route 17, Pavlov and Romashin followed in the Ford. The next observation of the Russian car was at about 9:10 p. m., when it was parked in a parking lot of Alexander's Shopping Center in Paramus, New Jersey, which is several miles from the Gold Key and a few minutes later, Romashin was seen to enter the car and drive out of the Alexander Center parking lot. At approximately 10:45 p. m., the Romashin car was proceeding west on Route 4 and an agent observed the Butenko car proceeding in the opposite direction, that is east, driven by Butenko and seated next to him was Gleb Pavlov. A review of G-19 and

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G-30, which was found later in Butenko's wallet, illustrates the above testimony.

On October 29th, 1963, the surveillance and arrest of the defendants was done by ten agents of the F.B.I. On that evening at seven o'clock, Butenko left his home in his blue Falcon sedan. He was carrying an attache case made of brown leather which he placed on the front seat and which was later introduced into evidence as G-28, Butenko acknowledging ownership of the case. He drove to Englewood, New Jersey, on the Garden State Parkway, and arrived there at a quarter to eight. Ivanov was observed at 6:00 p. m. in the vicinity of Englewood, New Jersey, driving a 1955 green Ford with Pavlov and Romashin as occupants. From 6:00 to 6:15 p. m., the three Russians were observed walking and driving in the vicinity of Dean Street, Englewood. The green Ford was seen at 7:00 p. m. at the Englewood railroad station and from 7:00 to 7:30 p. m. it was observed going back and forth across the railroad station parking lot and in and out of that station. During this period, there was extensive Soviet counter-surveillance and at one time Ivanov was driving and at another, Pavlov. At 7:37 p. m., Butenko's car was seen entering the railroad station and then leaving it and three minutes later, the Soviet automobile, with Pavlov, Romashin and Ivanov as occupants, left the railroad station. At 7:45 p. m., Butenko again drove in and out of the railroad station parking lot. At 7:55 p. m., Butenko's Falcon drove into the railroad station lot, parked, the headlights were turned off and the parking lights turned on. A few minutes later, the Soviet automobile, now driven by Pavlov with Ivanov in the right front seat, drove into the railroad station diagonally opposite to Butenko's automobile and the headlights were turned off and the parking lights turned on. After this signal was given, the Soviet car backed out of its parking space, came into the railroad station and parked perpen-

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dicular to the rear of the Falcon. Both cars remained in this position thirty-five seconds when the Soviet car pulled away toward the exit and the Falcon followed it. At 7:55 p. m., the Soviet automobile stopped at Grand Avenue and Tracy Place and Romashin left the car. Within two to three minutes, the F.B.I. moved in and arrested Butenko in his car, and some 200 to 300 feet away, Ivanov and Pavlov were arrested in the Soviet car. At the time of the arrest, Pavlov got out from behind the driver's wheel and Ivanov got out on the right side of the car.

It would seem that the evidence against Butenko was almost overwhelming as he had no valid reason for any association with Pavlov, Romashin and Olenov, who were Russian nationals attached to the Soviet mission to the United States, or with Ivanov, an employee of Amtorg Trading Company. His meetings with them in out-of-the-way places, in small communities in northern New Jersey can only be understandable if viewed, as they must be, in the light of the clandestine nature of them, at such hours as seven o'clock in the evening and in such places as parking lots behind supermarkets and railroad stations. None of the incidents hereinbefore recited were chance meetings, but gave every indication of being carefully worked out plans for the conspirators getting together.

The F.B.I. agents, following the arrest of the defendants, made an examination of the contents of the Soviet station wagon in which was found Butenko's attache case, two metallic electronic devices which were in fact signaling devices consisting of a transmitter and a receiver operating on a rechargeable battery, both of which devices were in excellent working condition, the receiver portion of the signaling device being found on the front seat where Ivanov and Pavlov had been sitting and the transmitter in a paper bag in the rear of the Soviet station wagon. In addition, in the shopping bag was found a radio with holes in the

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panel which, after its removal, there could be seen underneath the tube box a small compartment with a package which had been placed inside it, and when unwrapped, there was found a small camera in the guise of a cigarette case and two small film magazines. The cigarette case type camera was used primarily for photographing documents. There was no manufacturer's marking on it and it was custom-made. It had film in it fully loaded and ready to be operated.

Government exhibit G-28A was found in the briefcase of Butenko taken from the Soviet car. It described a major portion of the overall remote communications central located at the wing command post level, as well as the data located at the four major headquarter sites hereinabove referred to. It contained military and contract specifications which described the service conditions under which it was to be located and under which it must be operated; the maintainability aspects required and a goodly portion of the document concerned itself with the performance of the concentrator which is indicated in the title of the document, "RCC" meaning "Remote Communications Central" located at the wing command level and the heading, "EDL EC" meaning "Electronic Data Local Communications Central" which was located at each of the four headquarter sites.

The document G-28B, likewise found in Butenko's briefcase taken from the Soviet car, contained the applicable military and contractor specifications, as well as the essential elements of the concentrator. It provided details of each of the characteristics in terms of voltage, wave shape of the various internal concentrator pulses, as well as a table showing the relationship between the 465-L field data code and each of the corresponding letters and numbers and symbols that are used in the system. It was a document showing the time that the equipment necessary for the con-

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centrator is required to operate properly without any failure or lessening of its requisite function, as well as the "mean time repair" which it would take to repair any particular malfunction. It provided the cabinet drawings, sketches of cabinet assemblies and a full discussion of the various components that comprise the equipment described. The letters "A" and "B" after G-27 and G-28 indicate the first and second revision of the particular document, thus indicating its up-to-date revision which, as has been stated, was distributed to all key employees, including defendant Butenko. The information contained in both G-28A and G-28B related solely and directly to the 465-L system.

These documents found in the Soviet Union station wagon in the briefcase of Butenko, which briefcase has been transferred from Butenko to Pavlov, the actual observation of its transfer was not had, as can be readily seen, related directly and specifically to the national defense of the country and were carefully screened from the public eye, and were not in the public domain and could only be released by permission of the Secretary of Defense. Butenko has access to these documents only because of his top secret clearance status.

At the same time that the Soviet car was stopped, the Butenko car was likewise stopped and he was placed under arrest by the F.B.I. agents and taken to the office of the F.B.I. in Newark, New Jersey. He was asked to empty his pockets, which he did, and extracted a wallet from the left rear side of his trousers, and in the wallet was found exhibit G-30 which was a small piece of paper, folded, one side of which was a diagram showing the exact route which Butenko had taken on the 23rd and 24th of September, and on it was the following markings: "N1. Forever, (if something) Englewood, last sund, every m. 7.00 p. m. N2. Next. Ridgewood, N.J. Sept. 22 7.00 p. m." On the back of the folded slip of paper were twenty-one separate five digit

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numbers, two were repeats and two were G-28A and G-28B, numbers: the government introduced in evidence the remaining seventeen documents marked G-40 through G-56D, which corresponded to the seventeen five digit numbers on the slip of paper. These documents were all related to the 465-L system and, while it was not shown that they were in the possession of Butenko, it was the government's contention that this was in reality an espionage shopping list and that their inclusion on the slip of paper with the route traversed by Butenko on September 22nd showed the full scope of the conspiracy and its ultimate aim which had to be known to Butenko since it covered such a wide range of documents.

In his defense, Butenko asserted that he had to approve, among other things, sub-contractor requisitions and to decide whether the work was necessary and whether the money for its performance was within the budget and in the course of this phase of his work it was requisite that he be acquainted with all the requisitions of the 465-L system and to keep up to date thereon and he was able to do this by having the authority to secure any document that he deemed necessary on a need-to-know basis. This work which he and his associates were directly and indirectly responsible for in October of 1963 was worth about \$25,000,000. Likewise, he was a so-called "SRCC" (Simplex Remote Control Communicator), sub c Coordinator, and the "c" denotes its part of the 465-L equipment that was supposed to be at missile sites. He stated that since this equipment was in the development stage and there was no little confusion with respect to it his supervisor thought he would serve a very useful purpose as such Coordinator; that documents such as G-28A and G-28B supplied for him the necessary information to be helpful to him as he had to be closely associated with engineering proposals and that many times he took them home to study as well as examine them on other occasions when he was undisturbed by telephone

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calls and he further stated that G-28A and G-28B came from his file cabinets which were in an area assigned to him. He further testified that he never saw a top secret document all the time he was with the company and further that the briefcase which contained documents 28A and 28B were in his car and were taken from it by the agents at the time of his arrest and planted in the Soviet car.

He further testified that Pavlov was an individual known only to him as Lesnikopf whom he understood was somewhat vaguely related to affairs with the Soviet mission. He stated that initially his meetings with Lesnikopf were begun by Lesnikopf writing him a letter advising him that if he was interested in relatives in Russia he should meet him at the Chalet Restaurant in Closter and he would help him; that he went to the Chalet Restaurant, parked off the pavement when the man he knew as Lesnikopf came up to his car, asked his name and then invited him to dinner. They dined together and he kept meeting Lesnikopf (Pavlov) until the time of his arrest at the places the government witnesses testified they had placed him, but always his reason for meeting Lesnikopf (Pavlov) was concerning information about his relatives in Russia. He denied that G-29, a wallet, and the slip of paper, G-30, on which was crudely drawn the streets which Butenko traveled on September 24th, and the digit numbers placed on the back thereof, hereinabove referred to, belonged to him, and that the reason G-28A and G-28B were found in his briefcase was that he secured them in order to read them at home and at other places at his convenience, undisturbed by telephone calls. In the main, this was the defense which Butenko interposed and, as has been indicated, after hearing all the evidence, he was found guilty by the jury.

Accordingly, it is submitted that the evidence, as herein stated in detail, covering the surveillance by the F.B.I.

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agents of Butenko, coupled with the G-29 exhibit of the wallet and G-30, showed his full acquaintance with the aspects of the 465-L system and the finding of the documents, G-28A and G-28B in his own briefcase taken from the possession of Pavlov, in addition to his clandestine meetings with Pavlov and on two occasions the transfer of his attache case to him at these meetings, clearly meets the government's contention that there was sufficient evidence to sustain the averments in the indictments of the conspiracy therein alleged. This is not a case of mere suspicion. *United States v. Bufalino*, 2 Cir., 285 F.2d 408. Here, there was substantial evidence to buttress the conviction. *United States v. Guiliano*, 263 F.2d 582, 584 (3d Cir. 1959); *United States v. Johnson*, 4 Cir., 324 F.2d 264; *Diaz-Rosendo v. United States*, 9 Cir., 357 F.2d 124, 129; *United States v. Georgia*, 210 F.2d 45 (3d Cir. 1954).

As to Ivanov, while the evidence is less strong with respect to his participation in the conspiracy than that produced by the government against Butenko, since it is not as full nor as complete as against Butenko, as will be here indicated, sufficient evidence was offered by the government to show his intimate involvement with the conspiracy. Briefly related, they consisted in the main of the following: His involvement with the activities of Pavlov on April 21, 1963, as hereinabove recited, his activities with Pavlov and driving the Russian station wagon on May 26, 1963, hereinbefore recited, and the unusual circuitous driving pattern he followed in the area, and his activities on October 29, 1963, when he was observed driving a green Ford with a New York license number in the vicinity of Englewood, New Jersey, with Pavlov and Romashin seated in the rear thereof. For some time the three men were seen walking and driving in the general vicinity of Englewood and when next seen the car was in the Englewood railroad station parking lot where it remained for more than a half hour when the car was then seen going back and

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forth across the parking lot, out of the station, up and down adjoining streets, at one point driven by Ivanov and at another by Pavlov. Finally, Ivanov parked the car and all three got out and stood in the rear of it and were looking across a street directly at Operandi's Restaurant some 250 feet away. The three Russian nationals stood for several minutes behind the car when Ivanov walked across the street to the restaurant and stood looking very intently up and down the street for a few minutes when he was joined by Romashin, and then both went into the restaurant. Pavlov left the rear of the car and drove to the back of a closed filling station, got out and stood behind the rear of his car and kept looking at the restaurant all the while. A few minutes later, he got into the car, drove twice around a small park which faced the restaurant and parked some 150 feet from it and sat there a few minutes until he was joined by Romashin and Ivanov and they all got into the car and drove away. Some twenty minutes later, the Falcon, driven by Butenko, drove into the railroad station lot, parked, turned off the headlights and turned on the parking lights and within a few minutes the Soviet automobile, now driven by Pavlov with Ivanov in the right front seat, came into the parking lot, signaled by turning off headlights and turning on parking lights. Here, there was a direct confrontation between Ivanov and Butenko and several minutes later, when the defendants were arrested, the briefcase of Butenko was found in the Soviet automobile. All of this evidence which the government produced closely identifies Ivanov with the conspiracy in that his associations with Pavlov were marked by conduct shrouded by secrecy and concealment, as a lookout for Pavlov, as well as actively engaged in furthering the conspiracy as the events on the evening of October 29th disclose. Additionally, no evident reason was shown for Ivanov's presence in the small New Jersey communities, nor that he was, in being there, furthering the business of his employer, the Amtorg Trading Company, and, ac-

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cordingly, the evidence yields no reasonable hypothesis of innocence on his part and, on the other hand, tends to show his direct participation in activities which could only be found to be conspiratorial in nature.

The second count in the indictment charges John William Butenko and Igor A. Ivanov with unlawfully, willfully and knowingly conspiring and agreeing with each other and with Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, co-conspirators but not named defendants, to commit offenses against the United States, to wit, to violate 18 U.S.C. § 951.

It was part of said conspiracy that Butenko did unlawfully, willfully and knowingly act in the United States as an agent of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification to the Secretary of State, and that the defendant, Ivanov, and co-conspirators, Pavlov, Olenov and Romashin, did unlawfully, willfully and knowingly aid, abet and procure the defendant, Butenko, to act in the United States as an agent of a foreign government, to wit, the Union of Soviet Socialist Republic, without prior notification to the Secretary of State. In order to make proof of the averments in the second count of the indictment, the conspiracy as alleged in count I formed the basis of the proofs in connection with count II. The only additional factor offered in evidence was that Butenko had not registered with the Secretary of State as an agent of a foreign government. This was proven by testimony of the government that Butenko had not registered. It would be pure repetition to advert again to the factual averments which make up the conspiracy under the first count, already mentioned in detail, and together with the additional fact of Butenko's failing to register, just averted to, this, it is contended by the government, proves the allegations of the indictment under count II. With this we cannot agree.

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It is submitted that an essential element in the proof of the conspiracy here obtaining must be that Ivanov and the other alleged co-conspirators had knowledge of the fact that Butenko had not registered as an agent of a foreign government, either directly or indirectly by a compelling inference. It is sufficient, as we have indicated, that when there is established by circumstantial evidence or by deduction from facts from which a natural inference arises, that the overt acts were in furtherance of a common design, intent and purpose, there is sufficient proof. While the circumstances obtaining here show clandestine meetings and secretive conduct on the part of Ivanov, as set forth heretofore, they advance us not at all, in supplying the factual issue of knowledge on the part of Ivanov and the others that Butenko had not registered. Ivanov was an employee of the Amtorg Trading Company, unlike Pavlov, Olenov and Romashin, who were attaches of the Russian mission to the United Nations, and, while it might be inferred that the latter could have had knowledge of the plan that Butenko was not registered with the Secretary of State, by virtue of their high position in the Soviet mission to the United Nations, this inference could not be drawn against Ivanov, a mere employee of Amtorg. Here, knowledge of the fact, on the part of Ivanov, that Butenko had not registered, was a basic matter of proof which, as has been indicated, the record did not disclose. *Ingram v. United States*, 360 U.S. 672-678, 79 S.Ct. 1314, 3 L.Ed.2d 1503; *von Clemm v. Smith*, D.C., 255 F.Supp. 353, 368, aff'd 2 Cir., 363 F.2d 19. The fact that the government, in the introduction of exhibit G-16, showed that Ivanov had filed a statement with the Department of State showing his familiarity with the Foreign Agents Registration Act of 1938, as amended, under which there was a heading, 1(a) of instructions, which stated, quoting portions of the Act of June 25, 1948, wherein it was provided that no person other than a diplomat or consular officer or attache should

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act in the United States as an agent for a foreign government without prior notification to the Secretary of State, this showed only that he was familiar with the fact of registration, but it furthers, in no wise, the necessary essential that he knew Butenko had not registered as a foreign agent. Accordingly, it is submitted that, with respect to Ivanov, as to count II of the indictment, there must be a judgment of acquittal for lack of sufficient proof thereunder. However, this makes no difference in the disposition of the case because the sentence imposed on Ivanov under count I was for twenty years, which was within the limits of that permitted by the statute whose maximum was thirty years, and since the current sentence imposed under count II was five years, Ivanov cannot, on appeal, challenge his conviction on count II. *Lawn v. United States*, 355 U.S. 339, 359, 78 S.Ct. 311, 2 L.Ed.2d 321, citing *Sinclair v. United States*, 279 U.S. 263, 299, 49 S.Ct. 268, 73 L.Ed. 692; *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774. The appeal of double punishment with regard to the double conviction on both counts I and II cannot be considered a ground for reversal. *United States v. Goldman*, 352 F.2d 263 (3d Cir. 1965).

As respects Butenko's situation with reference to count II, it is submitted he knew he was not registered and the burden of proof was cast upon him to show more than mere denial since it is always an essential element of a crime such as this since the burden of going forward on the issue is placed on a defendant where, as here, the matter is peculiarly within his own knowledge. *Edwards v. United States*, 5 Cir., 334 F.2d 360, 366; *Blumenthal v. United States*, 8 Cir., 88 F.2d 522. However, Butenko's conviction on count II; even if we assume no conspiracy was shown by reason of lack of knowledge on the part of Pavlov, Romashin and Olenov that he was not registered, nevertheless does not affect the term of his sentence, as the same reasoning is applicable here as to that concerning

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Ivanov in count II hereof by reason of the fact that the sentence imposed on Butenko on count II, since it ran concurrently with that imposed on count I, being ten years, was, likewise, within the term validly imposed in count I. *Lawn v. United States*, supra, et al.

Similarly, it is unnecessary for us to consider the contentions of Butenko as to count III of the indictment in view of *Lawn v. United States*, supra, 355 U.S. at 359, 78 S.Ct. at 322. However, as to this count, which charges Butenko with the substantive offense of failing to register as an agent of a foreign government, there can be no question that he did not register as a foreign agent, as the record shows, and, accordingly, he knew that he had not registered as a foreign agent. Much was made in argument that Butenko was not an agent of the Soviet Union in that there was shown no contractual relationship between himself and the Soviet Union. However, this is not requisite nor necessary. As we have shown, as adverted to previously, the conduct of Butenko in connection with the transfer of classified documents to a representative of the Soviet mission, Pavlov, was sufficient to bring Butenko within the provisions of the statute. Furthermore, as has been indicated, a contractual relationship is unnecessary, since the act itself does not define the word "agent". The few judicial decisions in the field do not discuss the definition in any detail. The cases assume that it means one who acts directly or indirectly for the benefit of a foreign government. *Von Clemm v. Smith*, supra; *von Clemm v. United States*, 320 U.S. 769, 64 S.Ct. 81, 88 L.Ed. 459; *Hansen v. Brownell*, 98 U.S.App.D.C. 239, 234 F.2d 60; *United States v. Heine*, 2 Cir., 151 F.2d 813, 817.

Appellants also question whether or not the object of the conspiracy concerned national defense. Here the matter was left entirely in the jury's hands under proper in-

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struction in conformity with *Gorin v. United States*, 312 U.S. 19-32, 61 S.Ct. 429, 439, 85 L.Ed. 488, wherein the court said, in part: "It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined."

A critical examination of the court's charge relative to the crime of conspiracy leaves no room here for exception, as it was done correctly, at length and with great clarity.

DISCUSSION OF OTHER LEGAL POINTS RAISED

A point raised is the District Court's refusal to suppress certain physical evidence because of an assertedly unreasonable search and seizure. On the record, agents of the F.B.I. had reasonable cause to arrest Ivanov without a warrant. As to Butenko, he was arrested pursuant to a warrant already obtained. They also had reasonable cause to believe that a crime was being committed in their presence and that Ivanov was one of the co-conspirators. It was not necessary under the circumstances for them to have obtained a warrant for his arrest. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). Nor was it necessary for them to have obtained a warrant to search the green Ford sedan. The agents' subsequent search of that car was closely related to the reason Ivanov was arrested. *Cooper v. State of California*, 386 U.S. 58, 61-62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *United States v. Dento*, 382 F.2d 361, (C.A. 3, August 2, 1967). Likewise, the district court did not err in refusing to suppress the evidence in question.

Another point raised on appeal is the defendants' contention that by reason of the action of the State Depart-

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ment they had been deprived effectively of their right under the Sixth Amendment to have compulsory process for obtaining the attendance of witnesses in their behalf.

On October 30, 1963, the State Department caused a diplomatic note to be sent from the United States Mission to the United Nations to the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations concerning the involvement of Olenov, Pavlov and Romashin in espionage activities against the United States. In that note, the three accredited representatives of the Soviet mission were declared *persona non grata* because they had violated § 13(b) of the Headquarters Agreement between the United Nations and the United States. 22 U.S.C.A. § 287 note. The note requested that the three named representatives depart the United States on or before November 1, 1963. On the latter date counsel for Butenko, in a telegram addressed to the State Department, requested a stay of the terms of the diplomatic note to give him an opportunity to confer with the three representatives before they departed. On the same day the State Department sent a telegram to Butenko's counsel advising him that the departure request would be superseded until November 4, 1963. However, the three Soviet representatives departed the same day the telegrams were exchanged. From the time they departed, the precise whereabouts of the three Soviet representatives were unknown to defendants. The prosecution admits that they were beyond the jurisdiction of the district court.

Some months before the trial, District Judge Anthony T. Augelli signed an order on August 6, 1964, granting Butenko's request to take the deposition at government expense of the three former Soviet representatives to the United Nations, provided that Butenko could show that the three representatives would be willing to testify at oral deposition and that the Soviet Union would permit such

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an examination or would insist that Letters Rogatory be used. Approximately a month later, Butenko's counsel informed the district court that he was unable to secure any answer from the Soviet authorities with regard to the satisfaction of the conditions of the Court's order of August 6th, and requested a continuance for additional time to obtain a response from the Soviet government. The request was denied, the Court stating that more than sufficient time had been allowed to appellants.

It is submitted that the United States is not to be penalized for the inability of defendants to summon the three former Soviet representatives in their defense nor be required to forego prosecution until it produces those three individuals. By virtue of § 15 of the Headquarters Agreement the three Soviet representatives were "entitled in the territory of the United States to the same privileges and immunities, subject to the corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it." A diplomatic envoy accredited to the United States is immune from compulsory process to testify in a court of the United States. Rev.Stat. § 4063, 22 U.S.C.A. § 252; *Dupont v. Pichon*, 4 U.S. (4 Dall.) 321, 1 L.Ed. 851 (1805); Restatement (Second), Foreign Relations Law § 73. Such immunity may be waived only on behalf of the sending state. Restatement (Second), Foreign Relations Law § 79. Here the State Department treated the three Soviet representatives as having been entitled to diplomatic immunity.³ To end that status the State Department declared them to be *persona non grata*. Although their diplomatic immunity ended when they departed, all three from the time of their departure were beyond the jurisdiction of the district court and not available for any purposes to either the United States or the defendants.

But even if the State Department had not made the declaration and the three representatives had remained in

³ See *Arcaya v. Paez*, D.C. 145 F.Supp. 464, aff'd 244 F.2d 958 (C.A.2, 1956).

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the United States, there has been no showing that the Soviet Government would have waived the diplomatic immunity of the three and permitted them to testify in court and even indicate what they would say if they were permitted to testify. On the contrary, the record shows that the Soviet authorities have ignored the request by counsel for Butenko for permission to permit the three former representatives to testify by deposition or answer Letters Rogatory. Since the immunity is waived by the Sovereign and not the individual, as indicated, there is no showing that it would be waived or that their testimony would be favorable to the defense. Accordingly, no prejudice is found by reason of their departure.

Next, defendants claim the trial court committed reversible error in refusing to permit counsel to examine memoranda and reports of government agents which related to the subject matter of the indictment but not to the direct testimony of the agents who testified on behalf of the prosecution. In other words they contend that where an agent participated in more than one aspect of an investigation, but is called upon by the prosecution to testify only as to less than all of those aspects, his report relating to all other phases must be provided for the benefit of defense counsel pursuant to subsection (b) of § 3500 of the so-called Jencks Act, 18 U.S.C.A. § 3500(b).

During the course of the trial, after government agents testified on direct examination the prosecution made available to defense counsel those reports which it believed related to the testimony given by that particular witness. In each instance the trial judge declared a recess for the purpose of his examining additional reports to determine whether he should order the prosecution to deliver them to defendants for their examination and use. After he had examined those reports, the trial judge found that they did not relate to the subject matter to which the witness had just testified on direct examination. He therefore re-

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fused to instruct the prosecution to deliver them directly to the defendants.

Before a defendant is entitled to the delivery of a statement it must not only be within the meaning of subsection (e) of § 3500, but it must also comply with the provisions of subsection (b) of this section.⁴ Clearly if the entire statement does not relate to the subject matter of the indictment or information, the defendant is not entitled to a delivery of that statement over the objection of the prosecution. *Rosenberg v. United States*, 360 U.S. 367, 370, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959). And in our opinion a defendant is not entitled to statements when they do not relate to the subject matter as to which the witness has testified on direct examination, even though they relate to the subject matter of the indictment, information or investigation. See, for example: *United States v. Donlon*, 256 F.Supp. 336, 341-343 (D.C.Del.1966), aff'd per curiam 370 F.2d 987 (C.A. 3, 1967); *United States v. Birnbaum*, 337 F.2d 490, 497-498 (C.A. 2, 1964); *United States v. Heap*, 345 F.2d 170 (C.A. 2, 1965); *United States v. Umans*, 368 F.2d 725, 731 (C.A. 2, 1966); *Williamson v. United States*, 365 F.2d 12, 15-16 (C.A. 5, 1966); *Oertle v. United States*, 370 F.2d 719, 723-725 (C.A. 10, 1966). In addition to setting forth the conditions under which it was to be delivered over to the defendant, Congress was very careful in limiting the type of statement that was to be so delivered. Subsection (b) contains but two sentences. In the first Congress re-

⁴ Section 3500(b) of the Jencks Act provides: "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement * * * of the witness in the possession of the United States which *relates to the subject matter as to which the witness has testified*. If the entire contents of any such statement *relate to the subject matter of the testimony of the witness*, the court shall order it to be delivered directly to the defendant for his examination and use." (Emphasis added.)

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ferred to the statement as one which relates to the subject matter "as to which the witness has testified." In the second as being one which relates to the subject matter of "the testimony of the witness." And in subsection (c) to this section it refers to the statement twice as one which does not relate or relates to the subject matter of "the testimony of the witness."⁵

Other points raised by the appellant are devoid of merit and are not discussed.

The judgment in appeal No. 15170 as to Ivanov is affirmed as to count I and a judgment of acquittal is directed to be entered on count II thereof. The judgment in appeal No. 11232 as to Butenko is affirmed on all counts.

⁵ Senate Report No. 981 to the bill to amend the Criminal Code to provide for the production of statements and reports of government witnesses refers to them as follows:

"* * * relating to matter as to which the witness has testified.";

"* * * touching the events and activities as to which a Government witness has testified at trial, * * *.";

"* * * relate to the subject matter of the testimony of the witness.";

"* * * relate to the testimony of the witness at trial";

and

"* * * relates to the testimony of the witness."

See 1957 U.S. Code Cong. and Adm. News, pp. 1861, at 1862 and 1864.

*Judgment of the Court of Appeals***Judgment of the Court of Appeals**

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 18, 1964, be, and the same is hereby affirmed as to Count I and the District Court is directed to enter a judgment of acquittal as to Count II of the said judgment.

ATTEST:

THOMAS F. QUINN
Clerk

October 6, 1967

DEC 5 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No.  //

IGOR A. IVANOV, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No.

IGOR A. IVANOV, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Petitioner, Igor A. Ivanov, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming his conviction in the United States District Court for the District of New Jersey of conspiracy to transmit to the Soviet Union information relating to the national defense of the United States.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1967. By order of October 25, 1967, Justice Brennan extended the time for filing the petition for certiorari to and including November 27, 1967. By order of November 14, Justice Brennan extended the time for filing the petition for certiorari to and including December 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED¹

1. Whether the Jencks Act's limiting phrase "relates to the subject matter as to which the witness has testified", should be defined to require production, not only of materials touching directly upon the testimony given on direct examination, but also materials dealing with the facts enumerated during and matters necessarily comprehended within the direct, materials useful for impeachment for bias, interest, and defects of memory and perception, and materials related to the subject matter of the indictment.

2. Whether the unilateral action of a government agency, in this case the United States State Department, in placing witnesses to the events charged in the indictment beyond the reach of the defense through an expulsion order entered before a criminal defendant had bail or counsel, prejudices the defendant's right to meet the charge, to effective assistance of counsel, and to compulsory process.

¹ No question is raised concerning illegal electronic surveillance, on the assumption that the Solicitor General will, if there was any, disclose its presence. See Petition for Rehearing, *Kolod v. United States*, No. 133, October Term, 1967.

3. Whether the actions of a chauffeur in performing chauffeur duties during three of five meetings between one suspected conspirator and another gives probable cause for the chauffeur's arrest without warrant, and, if so, whether a warrantless search of the car in which he was riding was proper under any of the historic justifications for search incident to arrest. Within this question, is comprehended: (a) whether the "by-stander rule" rejected in dictum in *United States v. Di Re*, 332 U.S. 581, 593-94 (1948), should be held to violate the Fourth Amendment; and (b) whether the "incident search" rule should be limited to cases in which its historic justifications—weapons, possibility of escape, destruction of evidence, removal of evidence—are present.

4. Whether, if the arrest of petitioner was unlawful, his conviction is supported by the evidence, almost all of which the government adduced during a pretrial F.R.Crim.P. 41(e) hearing to show probable cause for petitioner's arrest.

STATUTE INVOLVED

18 U.S.C. § 3500:

* * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.

* * * *

STATEMENT

This case involves an alleged conspiracy between an American scientist employed by ITT and four Soviet citizens to transmit to the Soviet government the details of a Strategic Air Command control system known as Project 465-L. See T. 108-59. The characters are: John William Butenko, co-defendant in the court below and Control Administrator for the field operations section of Project 465-L; Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, accredited to the Soviet mission to the United Nations, T. 3917, and hence possessing immunity from prosecution; and Igor. A. Ivanov, the petitioner, never alleged or shown to have been more than a peripheral participant in the alleged conspiracy,^{1a} a Soviet citizen who neither speaks nor writes English and who is employed by the Soviet trading company, Amtorg, as a chauffeur, T. 475-77. T. 3917. Pavlov, Olenov, and Romashin were unin-

^{1a} Butenko testified he never met Ivanov, T. 3477, and knew Pavlov only as Lesnikov, someone to whom he would speak about relatives in the USSR. *E.g.*, T. 3432-47.

dicted co-conspirators. They were ordered by the United States State Department to leave the United States shortly after the arrest of Butenko and petitioner on October 29, 1963. Ex. C-20. Pavlov was repeatedly seen meeting with Butenko and was, if the government's evidence below be believed, the principal figure in the conspiracy on the Soviet side.

The government's lengthy and complex proof was addressed to the work of Butenko, the nature of System 465-L, and the activities of the alleged conspirators from April 1963 until the arrest of Butenko and Ivanov on October 29, 1963. The conspirators' activities were proved through the testimony of a number of FBI agents who participated in a carefully planned, coordinated series of surveillances over Butenko and Pavlov. These surveillances concededly included two illegal entries, by stealth, into Butenko's home by FBI agents. T. 3268-3321. The only evidence putting petitioner into the alleged conspiracy may be fairly summarized as follows:²

On April 21, 1963, about 6:30 p.m., Ivanov was seen riding on Livingston Street in Northvale, New Jersey in a Chevrolet station wagon registered to Amtorg. He was sitting in the front seat with Pavlov and Olenov. Ivanov and Olenov left the station wagon at a roadside diner and went in for a snack. T. 347-357. They were last seen in the diner at about 7:15. T. 483-85. There was no other evidence of their activity that evening. After leaving Olenov and Ivanov, Pavlov drove the station wagon to Closter, New Jersey, six miles away, drove into a supermarket parking

² The testimony relating to Ivanov was printed as an "Appendix to Appellant's Brief" in the Court of Appeals on file in this Court.

lot, got out of the station wagon and into Butenko's parked car where Butenko was sitting, and then returned to the station wagon. T. 360-64, 535-39. Between 8:00 and 9:15 p.m., Pavlov and Butenko were seen having dinner at a restaurant in Closter. T. 364-66.

On May 26, 1963, at about 4 p.m., Pavlov was seen driving the Amtorg station wagon north near the toll both at the Fort Lee, New Jersey, entrance to the Palisades Parkway, with Olenov as his passenger. T. 604-06. At about 6 p.m., Ivanov was seen driving the Amtorg wagon in Closter, New Jersey, with Pavlov and Olenov as passengers. Ivanov drove around Closter for about 20 minutes. At 6:52 p.m., the Amtorg wagon was seen, with only Pavlov in it, driving south on Piermont Road in Closter, followed by Butenko driving his own car. The two vehicles passed by Ivanov and Olenov, who were standing in front of the Old Hook Inn on Piermont Road. At 7:15 p.m., the station wagon pulled into a parking lot alongside the Old Hook Inn, Ivanov and Olenov got in, and the station wagon drove north on Old Hook Road. T. 612-19, 667-734. Between 8 p.m. and 9:30 p.m., Pavlov and Butenko were seen dining in the Florentine Garden Restaurant, seven miles away from the Old Hook Inn. T. 678-80, 802-03.

On May 27, 1963, Ivanov was observed by the FBI leaving the Soviet United Nations Mission Building on 67th Street in New York City and walking toward Third Avenue. T. 897-99.

The FBI conducted additional surveillances of meetings of Pavlov and Butenko between May and October, apparently without ever seeing Ivanov. On May 27,

Butenko and Pavlov apparently met in Fort Lee, New Jersey, at about 8 p.m. T. 814, 825-26, 837-38, 887-89, 3614. On September 23, Butenko drove in a circuitous manner around the streets of Ridgewood, New Jersey. T. 910-20. On September 24, he repeated the same driving pattern, eventually meeting Pavlov that evening at about 8:20 p.m. Pavlov and Butenko were seen to meet again later that same evening. T. 922-25, 3620-25.

As of October 29, 1963, the above constituted the total of all the evidence gathered by the FBI about Ivanov, or at least all the evidence which was presented at the trial. On October 29, 1963, FBI Special Agent Edmund J. Birch filed a complaint with the United States Commissioner for New Jersey and obtained an arrest warrant for Butenko on charges of conspiracy to violate 18 U.S.C. § 794(a). T. 35-38, App. to Appellant's Brief, p. 24a-32a. Ivanov, Pavlov, Romashin, and Olenov were named in the complaint as co-conspirators, but no warrant was sought for their arrest. The government contended, during a pretrial hearing, that there was no probable cause for the arrest of Ivanov as of the afternoon of October 29. T. 72-73.

The subsequent events of October 29 thus loom large, for they form the principal basis for the Government's proof of conspiracy to transmit information, and at the same time provide whatever support there may be for FBI Agent Parker's on-the-scene decision to arrest Ivanov. On October 29, 1963, Ivanov was first seen about 6 p.m. in Englewood, New Jersey, driving Romashin's 1955 Ford with Romashin and Pavlov as passengers. Ivanov parked the car on Ivy Lane in Englewood, New Jersey, and he and Romashin

walked across the street into a restaurant. Pavlov drove off in the Ford. After a short time, Pavlov returned in the same car and picked up Ivanov and Romashin. T. 1021-25.

At about 7 p.m. that evening, an FBI agent saw the Ford traveling near the railroad station parking lot in Englewood. From 7 p.m. until 8 p.m., the Ford was seen going in and out of the parking lot, sometimes driven by Ivanov and sometimes by Pavlov. T. 1062-66. At about 8 p.m., Pavlov, with Ivanov as a passenger, drove the car into the parking lot, turned off its headlights, turned on its parking lights, and then parked it at the rear of and perpendicular to Butenko's car. T. 1066-67. The two cars remained in this position for about 35 seconds, T. 1125; 1137, though there is no evidence that anything or anyone passed between them. The Ford then pulled out of the parking lot and the Butenko car followed it. The FBI stopped both cars and placed Butenko and Ivanov under arrest. T. 1141, 1156, 1332-33.

FBI Agent Conway testified that he removed an attache case from the back seat of the Ford and took it to the Hackensack FBI office where he inventoried the contents, consisting of two specifications for a portion of Project 465-L. T. 1246, 1291. None of the other agents on the scene saw the case or saw Agent Conway remove it from the car and none testified that there was opportunity for the case to have been passed to the Ford by Butenko. Butenko testified that the case was taken from his car. T. 3456.

The FBI conducted some examination of the interior of the Ford after Ivanov was arrested, and while he was being taken to one of the FBI vehicles at the

scene. The car was again searched in the parking lot of the Hackensack FBI office, while Ivanov was in the office and while he was on his way to the FBI office in Newark, New Jersey. T. 1170-1229; Motions transcript, August 1964, pp. 1-162. The government never obtained a warrant for the search of the Ford, although it did obtain one for a search of Butenko's car.

The items found inside the Romashin Ford included a signalling device, document camera, and related paraphernalia. *Ibid.* The FBI laboratory in Washington, did not find Ivanov's fingerprints on any of these items.

On October 30, 1963, the day after the arrest, the United States State Department caused a note to be sent to the Permanent Mission of the Union of Soviet Socialist Republics demanding that Pavlov, Olenev and Romashin leave the United States on or before November 1, 1963. Ex. G-20. Counsel for Butenko sent a telegram to the State Department asking that the expulsion order be stayed. The State Department, by telegram of November 1, said that the three would be permitted to remain in the United States until November 4, but for some reason not made clear by the evidence below, the three left on November 1. Exs. C-17, 18, 19, 20. During all this time, Ivanov was in jail without counsel.

The indictment charged the defendants and Pavlov, Romashin, and Olenev as unindicted co-conspirators, with conspiracy to transmit to the Soviet Government information relating to the national defense of the United States (18 U.S.C. § 794(c)), and with conspiracy to have Butenko operate, in violation of 18 U.S.C. § 951, as an agent for the Soviet Union without

registering as such (18 U.S.C. § 371). Butenko alone was charged with a violation of 18 U.S.C. § 951.

At the trial, the government's case-in-chief was constructed rather like the script of a play. The government proved the FBI agents' observations for each of the surveillance days upon which it chose to rely in the order in which the observations took place. As a result, some of the FBI agents took the stand more than once, and the evidence was heard in small fragments. At the close of each agent's testimony, the government tendered to the defense a copy of the agent's surveillance log covering the surveillance he had just testified to. The government withheld from the defense other logs and reports of other surveillances of the same defendants and their alleged co-conspirators conducted at other times and on other days. The Court read this withheld material and denied defense motions for its production for use in cross-examination. See Exs. C-1 through C-14; see also, *e.g.*, T. 366-77, 485-500, 539-42, 590-92, 606-07, 619-36, 680-82.³

The jury found both defendants guilty on all counts in which they were charged. The United States Court of Appeals for the Third Circuit reversed Ivanov's conviction on Count II for want of evidence.

REASONS FOR GRANTING THE WRIT

1. This case presents, in a context amenable to the drawing of persuasive and rational distinctions, the precise, narrow question of the scope of 18 U.S.C. § 3500(b)'s limiting phrase, "relates to the subject

³ The objections thus preserved were presented to the Court of Appeals by petitioner's co-defendant, whose appeal was consolidated with petitioner's, and were decided in the opinion reprinted in the Appendix.

matter as to which the witness has testified," a phrase apparently drawn from this Court's opinion in *Jencks v. United States*, 353 U.S. 657, 669 (1957). The meaning and scope of this phrase has never been passed upon by this Court, and the opinions of the Courts of Appeals present a bewildering array of interpretations reaching concrete results upon no very clear general principle. Important also in this context is this Court's recent reaffirmation of the desirability of maximum disclosure by the government to make possible full and searching cross-examination not only upon the narrow factual matters raised in the examination-in-chief, but also upon collateral matters touching bias and interest, and matters of capacity and recollection going to the weight of the witness's direct testimony. See generally *Dennis v. United States*, 384 U.S. 855 (1966). See also 3 Wigmore, *Evidence*, §§ 89-95 (3d ed. 1940).⁴

Examination of the record reveals the factual basis for the question presented. In this case, a number of FBI agents, directed by the Espionage Squad in New York City, conducted a lengthy and intensive investigation of the suspected conspirators. This investigation included a number of physical surveillances, as the withheld Jencks material in Court Exhibits 1 through 14 reveals.

Consider, as but one example, the testimony of FBI Special Agent McDougal. On May 26, 1963, Agent McDougal was posted in a construction trailer with

⁴ Moreover, the witnesses whose prior statements were withheld in this case were agents of the government, a party to the litigation. This Court has recognized that the need for cross-examination and the permissible scope of cross-examination in such a case is greater than with the ordinary witness. *Rea v. Missouri ex rel. Hayes*, 84 U.S. 532 (1873).

binoculars, to watch for evidence of the alleged conspiracy. At a distance of 100 yards, he saw a "1962 blue Chevrolet station wagon with three occupants", whom he named as Igor Ivanov, Vladimir Olenov, and Gleb Pavlov. He went on to describe Olenov as "dark hair, receding hair line, approximately 37, 38 years of age, and about five-eight or five-nine." Pavlov he described as "sandy hair, five feet eleven, six feet tall, roughly 175 or 180 pounds." T. 612-14. On cross-examination, McDougal had to admit that his description of the three, including their names, was garnered from prior surveillances, including some which he had himself conducted. T. 646-61. Yet the trial court denied production of the reports made by McDougal covering those prior surveillances. T. 619-36.

Add to this that the testimony of McDougal was given more than a year after his observation of May 26, 1968, and after he had conducted many more surveillances. The conduct of the FBI agents in making a warrantless arrest, and then a warrantless search of the car—as compared to the search of Butenko's car for which they obtained a warrant⁵—suggests, moreover, that the decision that Ivanov was criminally culpable may not have been made until October 29. Once such a decision is made, of course, many subtle forces are bound to operate upon the minds of those who know they are to be witnesses.⁶

⁵ Although there was, in addition, a warrantless search of Butenko's car at the point of arrest.

⁶ For example, the agent who saw Ivanov and Olenov standing in front of the Old Hook Inn on May 26 testified that their heads turned to follow the Pavlov and Butenko automobiles that passed by them. This bit of information, which the agent regarded as "significant", was not in the agent's surveillance report for May 26.

As Agent McDougal admitted, his testimony about the May 26 surveillance embodied his perceptions from earlier surveillances.⁷ That fact alone required production of the reports of those earlier surveillances, for as this Court said in *Jencks*, 353 U.S. at 667:

"The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

As to the reports on surveillances conducted after May 26, it is clear from the government's evidence that the FBI was engaged in a continuous process of investigation designed to bring the alleged conspirators to book, and involving the continual reinterpretation, in the light of subsequent observations and conclusions, of data earlier obtained. Agent McDougal's October 1964 testimony about May 26, 1963 perceptions was inevitably influenced by these later observations, and cross-examination would to that extent benefit from production of the later reports. The dangers of a change in remembered perception are not unlike those arising from repeated interviews with the government about a single event, reports of which were held producible in *Ogden v. United States*, 303 F.2d 724, 735-36 (9th Cir. 1962).

When it is considered, moreover, (1) that Ivanov never admitted that he was present at the May 26

⁷ This Court's opinion in *United States v. Wade*, 388 U.S. 218 (1967), underscores the importance of full and effective cross-examination when a prior identification is in issue. Nor were Agent McDougal's observations of Ivanov the only ones testified to. See, e.g., T. 729, 758-66.

meeting, (2) that Agent McDougal's purported observation of him at that time was made under not very advantageous conditions, and (3) that intervening between all the surveillances and the October 1964 testimony was the FBI's October 1963 conclusion that Ivanov was probably guilty, it becomes impossible to gainsay the cross-examination utility of the agent's reports of all of his surveillances.

In this case, the events observed and described by the agents place Pavlov and Butenko at the center of a conspiratorial design. At trial, however, the government sought to place Ivanov as close to the center of activity as the evidence would admit. Production of the agents' reports dealing with other surveillances would reveal that the FBI itself regarded Ivanov as a peripheral figure. Indeed, even with limited production of reports defense counsel was able to make some point of this fact.⁸ If one purpose of cross-examination is to place the direct testimony in context, then the agents' testimony could be evaluated only in the context of the integrated course of concerted conduct which comprised the investigation of the conspiracy charged in the indictment. The government always insists that the bits and pieces of evidence which typically make up a conspiracy case should be seen in perspective to be given their full weight.

⁸ Cross-examination revealed that one agent made a log sheet for Olenov and one for Pavlov, but none for Ivanov. T. 520-21. Further, production of other log sheets would have illustrated the same practice, as well as highlighting the absence of the alleged conspirators from places the FBI expected them to be. This latter point might well have provided negative evidence to rebut the inference of FBI omniscience inevitably raised by the way the government put in its proof. Cf. 2 Wigmore, *Evidence* § 664 (3d ed. 1940).

The defense must equally be given the chance to put matters in perspective. *Dennis, supra*, 384 U.S. at 873. Here the "constitutional questions . . . close to the surface" of *Jencks* begin to become patent.⁹ *Palermo v. United States*, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring).

Turning to the more general considerations underlying a decision on production under the *Jencks* Act, the limiting phrase "relates to the subject matter as to which the witness has testified," was chosen by the Congress with little explanation in the legislative history about its scope and meaning. The phrase is, however, almost identical to that employed by the Court in the *Jencks* opinion:

"Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." 353 U.S. at 669 (emphasis added).

The Court went on to distinguish admissibility, under the rules of materiality, relevancy, and inconsistency, from the standard thus enunciated, making clear that producibility is broader than admissibility. *Ibid.*⁹ Indeed, it may be argued that insertion by the Congress of the phrase "subject matter" evinces an intention to broaden the range of producible materials beyond the *Jencks* opinion.

⁹ This Court briefly alluded to the relationship between "relevancy" in an evidentiary sense and producibility under the *Jencks* Act in *Campbell v. United States*, 373 U.S. 487, 493 n.7 (1963), observing that two questions are "closely related", and citing *United States v. Berry*, 277 F.2d 826 (7th Cir. 1960). As to "inconsistency", see *United States v. Borelli*, 336 F.2d 376, 390-91 (2d Cir. 1964).

Lower court opinions are no more helpful than the legislative history. The Ninth Circuit has spoken very broadly:

"The problem is not whether a question framed precisely in the terms of the withheld material would relate to the subject matter of the direct examination, but rather whether the withheld material might be useful in framing questions which would be relevant to that subject matter." *Ogden v. United States*, 303 F.2d 724, 740 (9th Cir. 1962).

The Eighth Circuit, in *Hance v. United States*, 299 F.2d 389 (8th Cir. 1962), took a more restrictive view in holding reports of an undercover agent of the Secret Service not producible under the statute, even though made during a counterfeiting investigation which led to the arrest of the defendants and involving the subject matter of the indictment.

Other courts have relied upon the language of the Senate Report on the Jencks Bill and have said that the statements must relate to "the events and activities as to which a Government agent has testified at the trial." S. Rep. No. 569, 85th Cong., 1st Sess., p. 2. Examples include *United States v. Cardillo*, 316 F.2d 606 (2d Cir. —), *cert. den.*, 375 U.S. 822 (1963), although in *United States v. Simmons*, 281 F.2d 354 (2d Cir. 1960), the Second Circuit upheld nonproduction of a statement made by a bank robbery witness on *the same day* as the robbery on the ground that the statement did not "relate to" the direct testimony of the witness. Broader standards appear to govern when the material may have impeachment value. *E.g.*, *Rosenberg v. United States*, 360 U.S. 367 (1959), *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964).

Some rationalizing principle is clearly needed. Faith to the teaching of *Dennis* would dictate that the phrase "relate to the subject matter" be given the broadest reading. The following guidelines might be developed in the course of full briefing and argument:

a. The defense is clearly entitled to statements otherwise producible which are prior accounts of the very matters touched upon in the direct examination, and to materials dealing with related factual areas which might tend to qualify the direct testimony or place it in context. *E.g.*, in *United States v. Ellenbogen*, 341 F.2d 893 (2d Cir. 1965), a fraud case, a government witness testified about dealings with a bidder on government contracts, and the Court held that production of prior statements about similar deals with other contractors should have been ordered.

b. Materials which would provide the basis for impeachment for bias, prejudice or other motive to falsify should clearly be produced. This requirement may transcend the Jencks statute. See, *e.g.*, *Giles v. Maryland*, 386 U.S. 66 (1967).

c. Materials which would facilitate cross-examination touching upon the witness' knowledge, opportunity to observe, capacity, basis of recollection, experience used to evaluate the incidents testified to, and other matters generally falling as well under the head of impeachment, but concerned not with motive to falsify. See generally Wigmore, *Evidence*, §§ 989-95 (3d ed. 1940).¹⁰ In this regard, the prior statements of a witness provide a uniquely valuable weapon to the

¹⁰ Indeed, the illustration from *Langhorn's Trial*, given by Wigmore, § 995 at 635-36, bears a resemblance to the government's mode of proof in this case.

cross-examiner, for they possess many of the advantages of extrinsic aids to testimonial impeachment, such as the testimony of another that the defendant failed on a prior occasion accurately to observe an event, without requiring, as would extrinsic proof, the calling of other witnesses for the trial of collateral issues. Compare *Palermo*, 360 U.S. at 365 (Brennan, J., concurring). All of these areas are traditionally regarded as appropriate for cross-examination, even under the federal rule which limits it in scope to the examination-in-chief.

A standard calling for production of all prior statements helpful in these areas might well be phrased to require production of all reports touching upon those aspects of the preindictment investigation which relate to the subject matter of the indictment. Alternatively, the test in *Ogden, supra*, 303 F.2d at 740, might be taken as a starting point. Neither test would require turnover of the investigative file in every case, as was feared by the Congress and as the Jencks Act was designed to prevent. See generally *Palermo v. United States*, 360 U.S. 343 (1959). Every investigation involves false leads, interviews which produce nothing useful to the government and do not even concern the charges eventually brought or the persons eventually charged.

Cross-examination, apotheosized by Anglo-American writers on evidence as the greatest device known to judicial science for the discovery of truth, is not subject to uniform and precise analysis. Materials deadly in the hands of one advocate make no impression in the hands of another. What is plain is that the defense is entitled to all relevant aid in testing the govern-

ment's case. Perhaps clarification of the Jencks standard would put to rest the practice commented upon by Judge Friendly¹¹ in *United States v. Borelli*, 336 F.2d 376, 393 (2d Cir. 1964):

"We add our wonder at the Government's willingness, not unique to this case, to imperil convictions hoped to be obtained after immense effort, by cavilling over the delivery of such a paper, whose admissions would not add appreciably to the strength of the defense, but whose erroneous exclusion might lie just beyond an appellate court's power of rescue under the harmless error rule."

2. As recounted in the Statement, *supra*, the three unindicted co-conspirators were ordered by the State Department to leave the United States, and did so on November 1, 1963.¹² By this means, the defense was deprived of all opportunity to attempt to secure the cooperation of the three in meeting the charges of the indictment, thus raising an issue under the Sixth Amendment not analytically different from that considered by this Court in *Roviaro v. United States*, 353 U.S. 53 (1957), and by the Second Circuit in, *e.g.*, *United States v. Coplon*, 185 F.2d 629 (1960), cited with approval in *Dennis, supra*, 384 U.S. at 874, n. 20.

The three-expellees, as accredited diplomatic representatives of the Soviet Union, had certain immunities

¹¹ Echoing Mr. Justice Brennan in *Palermo*, 360 U.S. at 365-66.

¹² Apparently this action by the Department was not unpremeditated. At around the same time, similar treatment was given to other Soviet nationals who had previously been indicted for espionage but were afterwards conceded to have diplomatic status and immunity. See *United States v. Egorov*, 232 F. Supp. 732 (E.D.N.Y. 1964).

under Section 15 of the United Nations Headquarters Agreement; 61 Stat. 756, and under 22 U.S.C. §§ 252-53. Some immunity from compulsory process and absolute immunity from criminal prosecution is conferred by these provisions. See, e.g., *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965); *United States ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425 (S.D. N.Y. 1963).

But it is also clear that, had the three remained in the United States, they had it in their power to discuss the case with the defense, and even to testify *if they wished to do so*. The former they might do just as any witness might; the latter they could do because, although it is usually for a diplomat's government to waive the immunity or not, if the diplomat decides to appear and testify, the court will not interfere. That is a matter between the diplomat and his government, as is made clear in *Banco de Espana v. Federal Reserve Bank*, 28 F. Supp. 958, 972 (S.D.N.Y. 1939), *aff'd*, 114 F.2d 438 (2d Cir. 1940).

By ordering the three from the country, the State Department effectively put the entire matter of the witnesses' cooperation or noncooperation with the defense into the hands of the Soviet government and deprived the three of any voice they might have had in the matter. That the State Department may have had sound policy reasons behind its decision is not at all in issue. The informer's privilege in *Roviaro* and the need to protect state secrets in *Coplon* were equally with the policy expressed in the expulsion order important to the welfare of our government. But when government seeks a conviction for crime, it must sometimes choose between conflicting policies. *Roviaro* and

Coplon tell us that the choice cannot be at the defendant's expense.

In this context, the reasoning of Judge Goodman in *United States v. Powell*, 156 F. Supp. 526 (N.D. Calif. 1957), is persuasive. There the defense needed the assistance of persons in the People's Republic of China, and the government was ordered to choose between its policy of not validating passports for travel there and its desire to prosecute the defendants for sedition.

It would be a mistake to conceive this issue as one solely of compulsory process, as did the government in the court below. At stake here are a closely-related complex of values, imperfectly expressed in the phrase "adversary system", and given constitutional dimension in the Sixth Amendment. This case involves the right to confrontation, to meet and probe the government's case. *Dennis v. United States*, 384 U.S. 855, 870-71 (1966); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965). The right to effective assistance of counsel for one's defense, given new recognition in *United States v. Wade*, 388 U.S. 218 (1967), is also present, in the sense that counsel must not be hindered in the gathering of relevant facts.¹³ Policies akin to those behind the Sixth Amendment vicinage requirement are also at stake here, for there

¹³ The State Department's action constituted a procedural impediment to effective assistance analogous to those at issue in *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932); *Tinkle v. United States*, 254 F.2d 23 (8th Cir. 1958); *United States v. Koplin*, 227 F.2d 80 (7th Cir. 1955); *Willis v. Hunter*, 166 F.2d 721, 723 (10th Cir.), cert. denied, 334 U.S. 848 (1948) ("effective assistance" requires lawyer to have "ample opportunity to acquaint himself with the law and the facts").

is little practical difference between forcing a defendant to trial at a distance from his home and placing his potential witnesses beyond his reach.¹⁴

In sum, the government's conduct has raised an issue of first impression in this Court, amenable to resolution within the framework of this Court's recent decisions strengthening the adversary system in criminal litigation.

3. Question 3 arises from the warrantless arrest of petitioner, at about the same time as an arrest under warrant of Butenko, followed by a search of the Ford automobile in which petitioner was riding. The search, if justifiable at all, is so only as incident to the arrest.

The standard for a warrantless arrest is not yet clear, despite the extensive judicial literature.¹⁵ This Court has before it the "stop and frisk" cases of *Peters*, *Sibron*, and *Terry*, Nos. 63, 74, and 67, set for argument during the weeks of December 4 and 11, and these cases may provide vehicles for re-evaluation of the classic theory of arrest which was the subject of the Court's earlier decisions in, for example, *Henry v. United States*, 361 U.S. 98 (1959) and *Johnson v. United States*, 333 U.S. 10 (1948).

In this case, the issue arises as follows: The arrest was made, FBI Agent Parker testified, because he believed he had witnessed a crime being committed in

¹⁴ *United States v. Cores*, 356 U.S. 405, 410 (1958); *United States v. Johnson*, 323 U.S. 273, 275-76 (1944); *Hyde v. Shine*, 199 U.S. 62, 78 (1905); *United States v. National City Lines*, 7 F.R.D. 393, 402 (S.D. Calif. 1947). See Barber, *Venue in Federal Criminal Cases: A Plea for Return to Principle*, 42 Tex. L. Rev. 39 (1963).

¹⁵ See also 18 U.S.C. § 3052.

his presence when the Butenko car and the Ford were parked near one another in the railroad station parking lot. There is no direct evidence that the occupants of the two vehicles communicated with one another. There is no evidence that Ivanov handled anything in either car.¹⁶ There is no evidence that, even if there was some secret communication hidden from the agent's view, Ivanov had anything to do with it.

This case, on its facts, resembles most closely *United States v. Di Re*, 332 U.S. 581 (1948), in which the defendant was arrested as one of three persons sitting in a car, two of whom were engaged in what the police had grounds to believe was an illegal transaction in counterfeit rationing coupons. This Court rejected the theory of "collective guilt" implicit in the government's argument that bystander status alone confers probable cause.

In the present case, the arresting agent's conclusory assertion that when the two cars were parked together in the railroad parking lot "a violation of the espionage law had occurred or was occurring", Motion transcript, p. 55, is not only without support in the record in the sense that nothing was seen to pass from car to car, but signally fails to implicate Ivanov, who during the months of surveillance prior to that observation had been seen doing nothing other than chauffeur's work.

Despite *Di Re*, the concept of bystander guilt once again threatens to gain currency not only by its use in this case but also by its incorporation in the preliminary draft of the American Law Institute's Model

¹⁶ Even if there were such evidence, it would make no difference, for an arrest is not justifiable based upon what the incident search turns up.

Pre-Arraignment Code, which provided that the police may make dragnet arrests where "it is likely that only one or more but not all of the persons arrested may be guilty of the crime."¹⁷ Now, petitioner respectfully submits, is the time to hold this concept at war with the Fourth Amendment.¹⁸

As to the subsequent search, this case illustrates the confusion which may be engendered when the "incident search" rule is permitted to outrun its rationale. The first group of FBI agents to testify concerning the search of the Ford said that Ivanov was arrested, taken out of the car and led away to one of the many FBI vehicles on the scene. Agent Conway, according to the FBI testimony, reached inside the Ford and took out an attache case. Motion transcript, pp. 82-83. Other agents may have looked inside the vehicle, a "preliminary search", in the conclusory language of Agent Parker. *Id.* at 80-81. The proceedings on the motion to suppress were then concluded. Several days later, the government sought and obtained leave to present additional evidence. *Id.* at 120-21. Agent Evans testified that, as Ivanov was being led away, he entered the Ford by the passenger door and examined the contents of two paper shopping bags in the rear seat. He said he observed certain items of physical evidence later introduced at trial over defense objection, including the document camera, signalling device,

¹⁷ Discussed and quoted in Chief Judge Bazelon's letter to Attorney General Katzenbach, Appendix A to Kamisar, *Has the Court Left the Attorney General Behind?*, 54 Ky. L.J. 464, 486 (1966).

¹⁸ See, for an application of the dragnet arrest principle in potentially explosive context, *Trilling v. United States*, 260 F.2d 677, 690, n. 11 (D.C. Cir. 1958) (Bazelon, J.)

radio, and so on. He did not, he testified, participate in the arrest of Ivanov. During his ten minute search, he did not even know where Ivanov was. Thereafter, the car was taken to Hackensack for further search, while Ivanov was taken briefly to Hackensack and then on to Newark. *Id.* at 125-51.

The law of "incident search" has been the subject of earnest debate in the opinions of this Court, ranging from Justice Jackson's view in *Harris v. United States*, 331 U.S. 145, 197-98 (1946) (dissenting opinion), that courts are unable after the fact to make rational distinctions between what is reasonable and what is not, through Justice Frankfurter's cogent plea for restriction of the rule to the terms of its rationalizing principles, *United States v. Rabinowitz*, 339 U.S. 56, 72-73 (1950) (dissenting opinion), to the wide-ranging searches upheld in the cases criticized by Justice Frankfurter in *Rabinowitz*.¹⁹

There was a hint, no more, in *Preston v. United States*, 376 U.S. 364, 367 (1964), following the Court's uncritical repetition of earlier dicta, of a return to the initial justifications for the incident search rule: "the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent destruction of evidence of the crime." *Ibid.* These are the justifications alluded to by Justice Frankfurter, 339 U.S. at 72. Perhaps the need to prevent the fruits and instrumentali-

¹⁹ This case presents, of course, a warrantless arrest plus warrantless search, so no magistrate ever acted to check the agent's impulses to interfere with the petitioner's liberty. This case is thus different from *Rabinowitz*, in which there was an arrest warrant. See also *Harris v. United States*, 370 F.2d 477 (D.C. Cir. 1966), *cert. granted*, No. 92, October Term, 1967.

ties of crime from departing the jurisdiction could be added. *Carroll v. United States*, 267 U.S. 132 (1925). But if the rule is permitted a further expansion, it would indeed become unworkable. There would be no law except a series of *ad hoc* trial court judgments, only some of which could in the nature of things be reviewed by appellate courts and only a minute fraction of which would ever find their way to this Court. The Fourth Amendment is not like a rule of civil pleading permitting trial court discretion; it is crucial to the way in which we live our lives in a free society. Taken with other amendments, it defines the limits beyond which government may not go in interfering with our possessions, our papers, our words and our thoughts. Respect for its "imposing provenance" demands that its bounds be carefully delimited.

4. The fourth question is presented in full knowledge that the sufficiency of the evidence in a criminal case is not generally worthy of this Court's review on certiorari.²⁰ However, since the government put on virtually its entire case in resisting the petitioner's motion under Rule 41(e), Federal Rules of Criminal Procedure, we respectfully suggest that if the Court should hold the arrest to have been without probable cause, it follows ineluctably that the conviction must founder for want of evidence.

²⁰ Absent, e.g., some claim of due process denial as in *Thompson v. Louisville*, 362 U.S. 199 (1960) or the presence of a First Amendment question as in *Yates v. United States*, 354 U.S. 298 (1957).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS

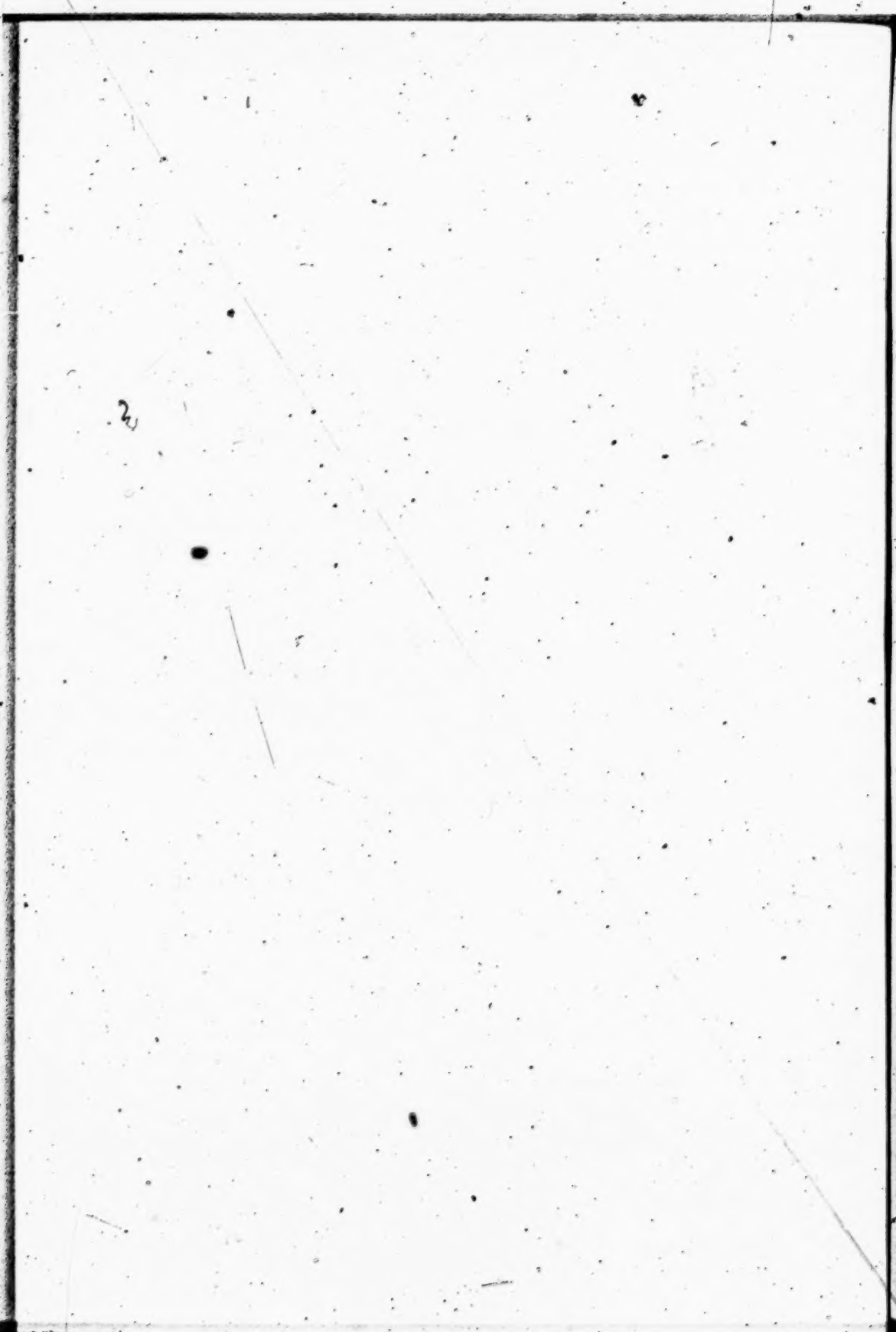
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Dated: December, 1967



APPENDIX

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 15170 AND 15232

UNITED STATES OF AMERICA

v.

JOHN WILLIAM BUTENKO AND IGOR A. IVANOV, *Appellants*

**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY**

Argued June 17, 1966

**Before: GANEY and SMITH, *Circuit Judges*, and
KIRKPATRICK, *District Judge*.**

Opinion of the Court

(Filed October 6, 1967)

By GANEY, *Circuit Judge*.

The appellants, John William Butenko and Igor A. Ivanov, were indicted by a federal grand jury in Newark, New Jersey, in a bill of indictment containing three counts. Count I charged conspiracy to violate the provisions of 18

U.S.S. 794(a) and (c),¹ count II charged conspiracy to violate the provisions of 18 U.S.C. 951,² and count III alleged a substantive violation against John W. Butenko alone in violation of 18 U.S.C. 951. Both defendants were found guilty on all counts by a jury and sentenced to the custody of the Attorney General, Butenko for thirty years and Ivanov for twenty years on count I, both were given five years on count II and on count III Butenko was given a sentence of ten years, the sentences on counts II and III to run concurrently with those imposed on count I. From these judgments, appeals were taken to this court and the matter is now before us for disposition as the court per-

¹ These subsections read as follows: "§ 794. Gathering or delivering defense information to aid foreign government.

"(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense shall be punished by death or by imprisonment for any term of years or for life.

"(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. . . ."

² This section reads as follows: "Agents of foreign governments

"Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both. . . ."

mitted the government's motion to consolidate the appeals of both defendants.

Under count I, a conspiracy was charged alleging an agreement among John W. Butenko and Igor A. Ivanov, as defendants, and Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, as co-conspirators, but not named as defendants, to unlawfully and knowingly conspire and agree to communicate and transmit to the Union of Soviet Socialist Republics, hereafter referred to as "U.S.S.R.", information relating to the national defense of the United States and, more specifically, information relating to the command and control system of the Strategic Air Command of the United States Air Force. It was further alleged that this activity was done with the intent and reason to believe that the said information would be used to the advantage of the U.S.S.R. The time within which the said conspiracy continued was from April 21, 1963, up to and including October 29, 1963.

The second count of the indictment charged Butenko and Ivanov, as defendants, and Pavlov, Olenov and Romashin, as co-conspirators, though not defendants, with conspiracy to violate 18 U.S.C. 951. It alleged that John W. Butenko, not a diplomat or consular official or cultural attache, unlawfully and knowingly acted in the United States as an agent of the U.S.S.R. without prior notification of the Secretary of State of the United States, and that defendant, Igor A. Ivanov, and co-conspirators, Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, unlawfully and knowingly did aid and abet and induce John W. Butenko to so act.

The third count charged John W. Butenko alone with unlawfully and knowingly acting as an agent of the U.S.S.R. without notification to the Secretary of State of the United States and not then being a diplomat or consular official or cultural attache, with violation of 18 U.S.C. 951.

The pertinent facts, for background, upon which the government relied for the conviction of the two defendants, as developed at the trial, are as follows: John W. Butenko, defendant, an American by birth, was an employee of the International Electronic Company, which is a subsidiary of International Telephone and Telegraph, and it was under contract with the United States Air Force to produce a command and control system for the Strategic Air Command. The project was given the name "465-L" and was an automatic electronic system which enabled the commander of the Strategic Air Command to alert and execute all his forces, at an extremely rapid rate to develop and plan his alternatives of operation and to give up to the minute status of the total force. Part of the operation of 465-L was the data transmission sub-system, whose function it was to permit rapid communication between Strategic Air Command headquarters and the various United States Air Force bases and missile sites. The four Strategic Air Command headquarter sites were located at Offutt Air Base, Nebraska; Westover Air Base, Massachusetts; Barksdale Air Base, Louisiana, and March Air Base, California. It enabled the Strategic Air Commander to communicate with his bases at the speed of light. The operational breakdown of 465-L was divided into five sections, one of which was the field operations division, and defendant, John W. Butenko, was the Control Administrator for the same. It was the responsibility of the field operations division, and accordingly his, to check on installations and requirements at the various air and missile bases and handle arrangements with the United States Air Force for the actual installation, training of Air Force personnel, spare parts provisioning, as well as taking care of maintenance and handling general administrative duties. He applied for and was given top secret clearance which gave him access to documents of top secret, confidential and unclassified nature, as he could secure them on a need-to-know basis.

From July 1, 1961, to July, 1963, Butenko received monthly reports updating necessary information concerning current specifications required for the 465-L program which set out the title, general subject matter, document classifications and specification numbers. The public did not have general access to the plant where Butenko was employed at Paramus, New Jersey, and the dissemination of the information concerning 465-L covered secret, confidential and unclassified information and even though some was unclassified, it could not be divulged to the general public unless permission from the Department of Defense and the Air Force was received. The contract between the Air Force and the Company was classified because parts of it were secret and top secret which made it a classified contract. The record discloses that all employees were made aware of the security requirements and were provided with a copy of the security manual which the defendant, Butenko, confirmed he had received.

The basis for the government's proof under the indictment was based largely on surveillance of the defendants and the co-conspirators by agents of the Federal Bureau of Investigation on April 21, 1963, May 26 and 27, 1963, September 23 and 24, 1963, and October 29, 1963.

Since the major contention of the appellants, both at argument and in their briefs, was that the evidence offered by the government was insufficient to support the averments in the indictment, and accordingly their conviction, it becomes necessary to recite in some detail much of the government's proof.

On April 21, 1963, the evidence showed that three agents of the Federal Bureau of Investigation conducted the surveillance, each testifying, sometimes piecemeal, as to the defendants' conduct, as one agent would have to break off surveillance and it would have to be taken up by another one, at a different position because of Soviet counter-surveillance, and the following was established:

At 6:00 p.m., Agent Birch was in the Northvale, New Jersey area and took notice of a 1962 bluish-green station wagon, New York license plate No. 2N3078, with three Russian nationals seated therein, Igor A. Ivanov and Vladimir I. Oleney seated in the front seat with Gleb Pavlov, who was driving. He kept the station wagon under surveillance until it stopped at a restaurant, Lou's Hitching Post, in Closter, New Jersey, and defendant, Ivanov, and Oleney left the station wagon to enter the restaurant, and they were observed sitting together at a table for some time.

The agent then noticed the station wagon for some twenty minutes making a series of turns in the area and a little later noticed it with Pavlov at the wheel on the shoulder of Piermont Road in Closter, New Jersey, at a point opposite the China Chalet Restaurant, which is in the area, and, almost at the same time, he noticed a 1961 Ford Falcon, four-door, turning from the road into and through the parking lot of the China Chalet Restaurant. This car was driven by John Butenko and the agent was able to read the license plate as New Jersey AVV871. At this point another agent picked up the surveillance and testified that a few minutes after the four-door Falcon sedan went into and through the parking lot of the China Chalet Restaurant, he observed the station wagon driven by Pavlov entering the parking lot of the nearby Finast supermarket. Through binoculars, he observed Pavlov leaving the station wagon and walking about twenty-five feet to the Ford Falcon, bearing license No. AVV871, which had already arrived there, and sat down in the front of the Ford Falcon beside Butenko who was in the car when Pavlov entered the lot. They both sat in the front seat, talked for a short period of time and then Pavlov left the Ford Falcon, this time carrying a light tan attache case. He then walked back to the station wagon with the attache case, re-entered it and drove out of the parking lot. When he entered the Falcon he had nothing in his hand whatsoever. The Soviet station wagon then proceeded to the lot

of Lou's Hitching Post restaurant to Ivanov and Olenev, where, on two different occasions, they were seen dining together and several minutes later surveillance disclosed Ivanov and Olenev no longer in Lou's Hitching Post restaurant and also that the Soviet station wagon was not in the parking lot. The agent then saw Butenko, about ten minutes later, leave the Ford Falcon in the Finast parking lot and walk for a few minutes to Piermont Road and then walk back to the Falcon and re-enter it. After about eight minutes more, Butenko again left the Falcon, walked slowly across the parking lot to Piermont Road where he met Pavlov and then walked out of his sight on Piermont Road, and Pavlov was not carrying an attache case. Some ten or fifteen minutes later, Pavlov and Butenko were seated together in Angelo's Closter Manor Restaurant, having dinner and conversing, and about fifty minutes later, the agent observed them paying the check and both Pavlov and Butenko left the restaurant and walked to Piermont Road, at which time surveillance was broken off. Butenko later admitted he had a tan attache case when he left home that evening but denied passing it to Pavlov.

On May 26, 1963, Agents Broderick, Mulvaney, McDougall, James, Conway and Ness, all of whom provided the testimony, observed the same Chevrolet station wagon driving back and forth past the Finast parking lot where Pavlov and Butenko had met on the night of April 21st. Ivanov was driving it with Olenev in the front seat and Pavlov in the rear. This unusual tactic was repeated three or four times. Earlier that evening, at about 5:15 p.m., Butenko was observed leaving his home in Orange, New Jersey, carrying a tan attache case and entering his car. He was observed driving from Orange, New Jersey, to Closter, New Jersey, where he arrived about 6:00 p.m., and a few minutes after he had parked his car on the Finast lot, the station wagon, now occupied only by Pavlov, entered the parking lot and then drove out, followed immediately by Butenko who proceeded to follow the station

wagon. At 7:05 p.m., Pavlov and Butenko drove past the Old Hook Inn where Olenov and Ivanov, the defendant, were seen standing by the side of the road in front of the Inn. Some fifteen minutes later, Pavlov was observed driving into the parking lot of the Inn, picking up Olenov and Ivanov and, after some conversation, the three men drove out of the lot. Later, at about 8:00 p.m., Butenko's car was observed in the parking lot of the Florentine Gardens restaurant which is about an hour's drive from the Old Hook Inn in the direction of Westwood, New Jersey, and Butenko could be observed in the bar until about 10:00 p.m. During this time he was seen leaving the restaurant on various occasions, going out to his car, opening the doors, looking in the front and back seats, as well as opening the trunk and feeling inside it. Finally, he entered his car and drove toward Orange, New Jersey, when observation was broken off. When Butenko testified in his own defense, he explained that his frequent trips to the car were made in an effort to find some lozenges.

It is submitted here that his conduct was conspiratorial and that surveillance rendered any passing of information impossible but which was accomplished the next day as here shown on May 27th.

The surveillance on May 27, 1963, was done by four agents of the F.B.I. At 3:45 p.m. Pavlov left the United Nations headquarters of the Soviet mission in New York, carrying a reddish-brown briefcase, tapered from bottom to top and accordion-like. A few minutes later, Ivanov was observed leaving the same building. At 5:45 p.m., Butenko left his work and drove to the Fort Lee area of New Jersey, and at approximately 8:00 p.m., Pavlov was seen standing next to a blue Falcon car bearing Butenko's license number, talking to a single individual sitting in the driver's seat of the blue Falcon. A half hour later, Butenko parked his car in the rear of 366 Park Avenue,

Orange, New Jersey, near his home, and got out carrying a tan, reddish-brown briefcase, accordion-like and tapered from bottom to top. In his defense, he acknowledged coming home that evening with such a briefcase.

On the date of September 23rd, surveillance disclosed that Butenko came to an area described on exhibit G-19, which is in or near Ridgewood, New Jersey, and also set out in exhibit G-30, later adverted to, and went up and down various streets making U-turns and following a circuitous pattern in a very unusual manner. The route taken on this day was described as a "dry-run". On September 24th, he took essentially the same route as that taken on September 23rd, with some minor deviations, and finally parked beside the Gold Key restaurant in the northern New Jersey area for some ten or fifteen minutes. During this time Pavlov and Romashin were standing across the road at a shopping center, looking in the direction of the Gold Key. About 8:20 p.m., the Falcon, with Butenko, left the Gold Key and drove south on Route 17, Pavlov and Romashin following in the Ford. The next observation of the Russian car was at about 9:10 p.m., when it was parked in a parking lot of Alexander's Shopping Center in Paramus, New Jersey, which is several miles from the Gold Key and a few minutes later, Romashin was seen to enter the car and drive out of the Alexander Center parking lot. At approximately 10:45 p.m., the Romashin car was proceeding west on Route 4 and an agent observed the Butenko car proceeding in the opposite direction, that is east, driven by Butenko and seated next to him was Gleb Pavlov. A review of G-19 and G-30, which was found later in Butenko's wallet, illustrates the above testimony.

On October 29th, 1963, the surveillance and arrest of the defendants was done by ten agents of the F.B.I. On that even at seven o'clock, Butenko left his home in his blue Falcon sedan. He was carrying an attache case made

of brown leather which he placed on the front seat and which was later introduced into evidence as G-28, Butenko acknowledging ownership of the case. He drove to Englewood, New Jersey, on the Garden State Parkway, and arrived there at a quarter to eight. Ivanov was observed at 6:00 p.m. in the vicinity of Englewood, New Jersey, driving a 1955 green Ford with Pavlov and Romashin as occupants. From 6:00 to 6:15 p.m., the three Russians were observed walking and driving in the vicinity of Dean Street, Englewood. The green Ford was seen at 7:00 p.m. at the Englewood railroad station and from 7:00 to 7:30 p.m. it was observed going back and forth across the railroad station parking lot and in and out of that station. During this period, there was extensive Soviet counter-surveillance and at one time Ivanov was driving and at another, Pavlov. At 7:37 p.m., Butenko's car was seen entering the railroad station and then leaving it and three minutes later, the Soviet automobile, with Pavlov, Romashin and Ivanov as occupants, left the railroad station. At 7:45 p.m., Butenko again drove in and out of the railroad station parking lot. At 7:55 p.m., Butenko's Ford drove into the railroad station lot, parked, the headlights were turned off and the parking lights turned on. A few minutes later, the Soviet automobile, now driven by Pavlov with Ivanov in the right front seat, drove into the railroad station diagonally opposite to Butenko's automobile and the headlights were turned off and the parking lights turned on. After this signal was given, the Soviet car backed out of its parking space, came into the railroad station and parked perpendicular to the rear of the Ford car. Both cars remained in this position thirty-five seconds when the Soviet car pulled away toward the exit and the Ford car followed it. At 7:55 p.m., the Soviet automobile stopped at Grand Avenue and Tracy Place and Romashin left the car. Within two to three minutes, the F.B.I. moved in and arrested Butenko in his car and some 200 to 300 feet away, Ivanov and Pavlov were arrested in the Soviet car. At

the time of the arrest, Pavlov got out from behind the driver's wheel and Ivanov got out on the right side of the car.

It would seem that the evidence against Butenko was almost overwhelming as he had no valid reason for any association with Pavlov, Romashin and Olenov, who were Russian nationals attached to the Soviet mission to the United States, or with Ivanov, an employe of Amtorg Trading Company. His meetings with them in out-of-the-way places, in small communities in northern New Jersey can only be understandable if viewed, as they must be, in the light of the clandestine nature of them, at such hours as seven o'clock in the evening and in such places as parking lots behind supermarkets and railroad stations. None of the incidents heretofore recited were chance meetings, but gave every indication of being carefully worked out plans for the conspirators getting together.

The F.B.I. agents, following the arrest of the defendants, made an examination of the contents of the Soviet station wagon in which was found Butenko's attache case, two metallic electronic devices which were in fact signaling devices consisting of a transmitter and a receiver operating on a rechargeable battery, both of which devices were in excellent working condition, the receiver portion of the signaling device being found on the front seat where Ivanov and Pavlov had been sitting and the transmitter in a paper bag in the rear of the Soviet station wagon. In addition, in the shopping bag was found a radio with holes in the panel which, after its removal, there could be seen underneath the tube box a small compartment with a package which had been placed inside it, and when unwrapped, there was found a small camera in the guise of a cigarette case and two small film magazines. The cigarette case type camera was used primarily for photographing documents. There was no manufacturer's marking on it and it was custom-made. It had film in it fully loaded and ready to be operated.

Government exhibit G-28A was found in the briefcase of Butenko taken from the Soviet car. It described a major portion of the overall remote communications central located at the wing command post level, as well as the data located at the four major headquarter sites hereinabove referred to. It contained military and contract specifications which described the service conditions under which it was to be located and under which it must be operated; the maintainability aspects required and a good portion of the document concerned itself with the performance of the concentrator which is indicated in the title of the document, "RCC" meaning "Remote Communications Central" located at the wing command level and the heading, "EDLEC" meaning "Electronic Data Local Communications Central" which was located at each of the four headquarter sites.

The document G-28B, likewise found in Butenko's briefcase taken from the Soviet car, contained the applicable military and contractor specifications, as well as the essential elements of the concentrator. It provided details of each of the characteristics in terms of voltage, wave shape of the various internal concentrator pulses, as well as a table showing the relationship between the 465-L field data code and each of the corresponding letters and numbers and symbols that are used in the system. It was a document showing the time that the equipment necessary for the concentrator is required to operate properly without any failure or lessening of its requisite function, as well as the "mean time repair" which it would take to repair any particular malfunction. It provided the cabinet drawings, sketches of cabinet assemblies and a full discussion of the various components that comprise the equipment described. The letters "A" and "B" after G-27 and G-28 indicate the first and second revision of the particular document, thus indicating its up-to-date revision which, as has been stated, was distributed to all key employees, including defendant Butenko. The information contained in both

G-28A and G-28B related solely and directly to the 465-L system.

These documents found in the Soviet Union station wagon in the briefcase of Butenko, which briefcase had been transferred from Butenko to Pavlov, the actual observation of its transfer was not had, as can be readily seen, related directly and specifically to the national defense of the country and were carefully screened from the public eye, and were not in the public domain and could only be released by permission of the Secretary of Defense. Butenko had access to these documents only because of his top secret clearance status.

At the same time that the Soviet car was stopped, the Butenko car was likewise stopped and he was placed under arrest by the F.B.I. agents and taken to the office of the F.B.I. in Newark, New Jersey. He was asked to empty his pockets, which he did, and extracted a wallet from the left rear side of his trousers, and in the wallet was found exhibit G-30 which was a small piece of paper, folded, one side of which was a diagram showing the exact route which Butenko had taken on the 23rd and 24th of September, and on it was the following markings: "N1. Forever (if something) Englewood, last sund, every m. 7.00 p.m. N2. Next. Ridgwood, N.J. Sept. 22 7.00 p.m." On the back of the folded slip of paper were twenty-one separate five digit numbers, two were repeats and two were G-28A and G-28B, numbers: the government introduced in evidence the remaining seventeen documents marked G-40 through G-56D, which correspond to the seventeen five digit numbers on the slip of paper. These documents were all related to the 465-L system and, while it was not shown that they were in the possession of Butenko, it was the government's contention that this was in reality an espionage shopping list and that their inclusion on the slip of paper with the route traversed by Butenko on September 22nd showed the full scope of the conspiracy and its ultimate aim which had to be

known to Butenko since it covered such a wide range of documents.

In his defense, Butenko asserted that he had to approve, among other things, sub-contractor requisitions and to decide whether the work was necessary and whether the money for its performance was within the budget and in the course of this phase of his work it was requisite that he be acquainted with all the requisitions of the 465-L system and to keep up to date thereon and he was able to do this by having the authority to secure any document that he deemed necessary on a need-to-know basis. This work which he and his associates were directly and indirectly responsible for in October of 1963 was worth about \$25,000,000. Likewise, he was a so-called "SRCC" (Simplex Remote Control Communicator), sub c Coordinator, and the "c" denotes its part of the 465-L equipment that was supposed to be at missile sites. He stated that since this equipment was in the development stage and there was no little confusion with respect to it his supervisor thought he would serve a very useful purpose as such Coordinator; that documents such as G-28A and G-28B supplied for him the necessary information to be helpful to him as he had to be closely associated with engineering proposals and that many times he took them home to study as well as examine them on other occasions when he was undisturbed by telephone calls and he further stated that G-28A and G-28B came from his file cabinets which were in an area assigned to him. He further testified that he never saw a top secret document all the time he was with the company and further that the briefcase which contained documents 28A and 28B were in his car and were taken from it by the agents at the time of his arrest and planted in the Soviet car.

He further testified that Pavlov was an individual known only to him as Lesnikopf whom he understood was somewhat vaguely related to affairs with the Soviet mission. He stated that initially his meetings with Lesnikopf

were begun by Lesnikopf writing him a letter advising him that if he were interested in relatives in Russia he should meet him at the Chalet Restaurant in Closter and he would help him; that he went to the Chalet Restaurant, parked off the pavement when the man he knew as Lesnikopf came up to his car, asked his name and then invited him to dinner. They dined together and he kept meeting Lesnikopf (Pavlov) until the time of his arrest at the places the government witnesses testified they had placed him, but always his reason for meeting Lesnikopf (Pavlov) was concerning information about his relatives in Russia. He denied that G-29, a wallet, and the slip of paper, G-30, on which was crudely drawn the streets which Butenko traveled on September 24th, and the digit numbers placed on the back thereof, hereinabove referred to, belonged to him, and that the reason G-28A and G-28B were found in his briefcase was that he secured them in order to read them at home and at other places at his convenience, undisturbed by telephone calls. In the main, this was the defense which Butenko interposed and, as has been indicated, after hearing all the evidence, he was found guilty by the jury.

Accordingly, it is submitted that the evidence, as herein stated in detail, covering the surveillance by the F.B.I. agents of Butenko, coupled with the G-29 exhibit of the wallet and G-30, showed his full acquaintance with the aspects of the 465-L system and the finding of the documents, G-28A and G-28B in his own briefcase taken from the possession of Pavlov, in addition to his clandestine meetings with Pavlov and on two occasions the transfer of his attache case to him at these meetings, clearly meets the government's contention that there was sufficient evidence to sustain the averments in the indictments of the conspiracy therein alleged. This is not a case of mere suspicion. *United States v. Bufalino*, 285 F. 2d 408. Here, there was substantial evidence to buttress the conviction. *United States v. Guiliano*, 263 F. 2d 582, 584 (3d Cir. 1959);

United States v. Johnson, 324 F. 2d 264; *Diaz-Rosendo v. United States*, 357 F. 2d 124, 129; *United States v. Georgia*, 210 F. 2d 45 (3d Cir. 1954).

As to Ivanov, while the evidence is less strong with respect to his participation in the conspiracy than that produced by the government against Butenko, since it is not as full nor as complete as against Butenko, as will be here indicated, sufficient evidence was offered by the government to show his intimate involvement with the conspiracy. Briefly related, they consisted in the main of the following: His involvement with the activities of Pavlov on April 21, 1963, as hereinabove recited, his activities with Pavlov and driving the Russian station wagon on May 26, 1963, hereinbefore recited, and the unusual circuitous driving pattern he followed in the area, and his activities on October 29, 1963, when he was observed driving a green Ford with a New York license number in the vicinity of Englewood, New Jersey, with Pavlov and Romashin seated in the rear thereof. For some time the three men were seen walking and driving in the general vicinity of Englewood and when next seen the car was in the Englewood railroad station parking lot where it remained for more than a half hour when the car was then seen going back and forth across the parking lot, out of the station, up and down adjoining streets, at one point driven by Ivanov and at another by Pavlov. Finally, Ivanov parked the car and all three got out and stood in the rear of it and were looking across a street directly at Operandi's Restaurant some 250 feet away. The three Russian nationals stood for several minutes behind the car when Ivanov walked across the street to the restaurant and stood looking very intently up and down the street for a few minutes when he was joined by Romashin, and then both went into the restaurant. Pavlov left the rear of the car and drove to the back of a closed filling station, got out and stood behind the rear of his car and kept looking at the restaurant all the while. A few minutes later, he got

into the car, drove twice around a small park which faced the restaurant and parked some 150 feet from it and sat there a few minutes until he was joined by Romashin and Ivanov and they all got into the car and drove away. Some twenty minutes later, the Ford Falcon, driven by Butenko, drove into the railroad station lot, parked, turned off the headlights and turned on the parking lights and within a few minutes the Soviet automobile, now driven by Pavlov with Ivanov in the right front seat, came into the parking lot, signaled by turning off headlights and turning on parking lights. Here, there was a direct confrontation between Ivanov and Butenko and several minutes later, when the defendants were arrested, the briefcase of Butenko was found in the Soviet automobile. All of this evidence which the government produced closely identifies Ivanov with the conspiracy in that his associations with Pavlov were marked by conduct shrouded by secrecy and concealment, as a lookout for Pavlov, as well as actively engaged in furthering the conspiracy as the events on the evening of October 29th disclose. Additionally, no evident reason was shown for Ivanov's presence in the small New Jersey communities, nor that he was, in being there, furthering the business of his employer, the Amtorg Trading Company, and, accordingly, the evidence yields no reasonable hypothesis of innocence on his part and, on the other hand, tends to show his direct participation in activities which could only be found to be conspiratorial in nature.

The second count in the indictment charges John William Butenko and Igor A. Ivanov with unlawfully, willfully and knowingly conspiring and agreeing with each other and with Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, co-conspirators but not named defendants, to commit offenses against the United States, to wit, to violate 18 U.S.C. 951.

It was part of said conspiracy that Butenko did unlawfully, willfully and knowingly act in the United States

as an agent of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification to the Secretary of State, and that the defendant, Ivanov, and co-conspirators, Pavlov, Olenov and Romashin, did unlawfully, willfully and knowingly aid, abet and procure the defendant, Butenko, to act in the United States as an agent of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification of the Secretary of State. In order to make proof of the averments in the second count I formed the basis of the proofs in connection with count II. The only additional factor offered in evidence was that Butenko had not registered with the Secretary of State as an agent of a foreign government. This was proven by testimony of the government that Butenko had not registered. It would be pure repetition to advert again to the factual averments which make up the conspiracy under the first count, already mentioned in detail, and together with the additional fact of Butenko's failing to register, just adverted to, this it is contended by the government proves the allegations of the indictment under count II. With this we cannot agree.

It is submitted that an essential element in the proof of the conspiracy here obtaining must be that Ivanov and the other alleged co-conspirators had knowledge of the fact that Butenko had not registered as an agent of a foreign government, either directly or indirectly by a compelling inference. It is sufficient, as we have indicated, that when there is established by circumstantial evidence or by deduction from facts from which a natural inference arises, that the overt acts were in furtherance of a common design, intent and purpose, there is sufficient proof. While the circumstances obtaining here show clandestine meetings and secretive conduct on the part of Ivanov, as set forth heretofore, they advance us not at all, in supplying the factual issue of knowledge on the part of Ivanov and the others that Butenko had not registered. Ivanov was an employe of the Amtorg Trading Company, unlike

Pavlov, Olenov and Romashin, who were attaches of the Russian mission to the United Nations, and, while it might be inferred that the latter could have had knowledge of the plan that Butenko was not registered with the Secretary of State, by virtue of their high position in the Soviet mission to the United Nations, this inference could not be drawn against Ivanov, a mere employe of Amtorg. Here, knowledge of the fact, on the part of Ivanov, that Butenko had not registered, was a basic matter of proof which, as has been indicated, the record did not disclose. *Ingram v. United States*, 360 U.S. 672-678; *von Clemm v. Smith*, 255 F. Supp. 353, 368, *aff'd* 363 F. 2d 19. The fact that the government in the introduction of exhibit G-16 showed that Ivanov had filed a statement with the Department of State showing his familiarity with the Foreign Agents Registration Act of 1938, as amended, under which there was a heading, 1(a) of instructions, which stated, quoting portions of the Act of June 25, 1948, wherein it was provided that no person other than a diplomat or consular officer or attache should act in the United States as an agent for a foreign government without prior notification to the Secretary of State, this showed only that he was familiar with the fact of registration, but it furthers, in no wise, the necessary essential that he knew Butenko had not registered as a foreign agent. Accordingly, it is submitted that, with respect to Ivanov, as to count II of the indictment, there must be a judgment of acquittal for lack of sufficient proof thereunder. However, this makes no difference in the disposition of the case because the sentence imposed on Ivanov under count I was for twenty years, which was within the limits of that permitted by the statute whose maximum was thirty years, and since the current sentence imposed under count II was five years, Ivanov cannot, on appeal, challenge his conviction on count II. *Lawn v. United States*, 355 U.S. 339, 359, citing *Sinclair v. United States*, 279 U.S. 263, 299; *Hirabayashi v. United States*, 320 U.S. 81. The appeal of

double punishment with regard to the double conviction on both counts I and II cannot be considered a ground for reversal. *United States v. Goldman*, 352 F. 2d 263 (3d Cir. 1965).

As respects Butenko's situation with reference to count II, it is submitted he knew he was not registered and the burden of proof was cast upon him to show more than mere denial since it is always an essential element of a crime such as this since the burden of going forward on the issue is placed on a defendant where, as here, the matter is peculiarly within his own knowledge. *Edwards v. United States*, 334 F. 2d 360, 366; *Blumenthal v. United States*, 88 F. 2d 522. However, Butenko's conviction on count II, even if we assume no conspiracy was shown by reason of lack of knowledge on the part of Pavlov, Romashin and Olenov that he was not registered, nevertheless does not affect the term of his sentence, as the same reasoning is applicable here as to that concerning Ivanov in count II hereof by reason of the fact that the sentence imposed on Butenko on count II, since it ran concurrently with that imposed on count I, being ten years, was, likewise, within the term validly imposed in count I. *Lawn v. United States*, *supra*, et al.

Similarly, it is unnecessary for us to consider the contentions of Butenko as to count III of the indictment in view of *Lawn v. United States*, *supra*, at 359. However, as to this count, which charges Butenko with the substantive offense of failing to register as an agent of a foreign government, there can be no question that he did not register as a foreign agent, as the record shows, and, accordingly, he knew that he had not registered as a foreign agent. Much was made in argument that Butenko was not an agent of the Soviet Union in that there was shown no contractual relationship between himself and the Soviet Union. However, this is not requisite nor necessary. As we have shown, as adverted to previously, the conduct of

Butenko in connection with the transfer of classified documents to a representative of the Soviet mission, Pavlov, was sufficient to bring Butenko within the provisions of the statute. Furthermore, as has been indicated, a contractual relationship is unnecessary, since the act itself does not define the word "agent". The few judicial decisions in the field do not discuss the definition in any detail. The cases assume that it means one who acts directly or indirectly for the benefit of a foreign government. *von Clemm v. Smith*, *supra*, cert. denied 320 U.S. 769; *Hansen v. Brownell*, 234 F. 2d 60; *United States v. Heine*, 151 F. 2d 813-817 (7).

Appellants also question whether or not the object of the conspiracy concerned national defense. Here the matter was left entirely in the jury's hands under proper instruction in conformity with *Gorin v. United States*, 312 U.S. 19-32, wherein the court said, in part: "It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury, as negligence upon undisputed facts is determined."

A critical examination of the court's charge relative to the crime of conspiracy leaves no room here for exception, as it was done correctly, at length and with great clarity.

DISCUSSION OF OTHER LEGAL POINTS RAISED.

A point raised is the District Court's refusal to suppress certain physical evidence because of an assertedly unreasonable search and seizure. On the record, agents of the F.B.I. had reasonable cause to arrest Ivanov without a warrant. As to Butenko, he was arrested pursuant to a warrant already obtained. They also had reasonable cause to believe that a crime was being committed in their

presence and that Ivanov was one of the co-conspirators. It was not necessary under the circumstances for them to have obtained a warrant for his arrest. *Warden, Maryland Penitentiary v. Hayden*, U.S. , (May 29, 1967). Nor was it necessary for them to have obtained a warrant to search the green Ford sedan. The agents' subsequent search of that car was closely related to the reason Ivanov was arrested. *Cooper v. California*, 386 U.S. 58, 61-62 (1967); *United States v. Dento*, F. 2d , (C.A. 3, August 2, 1967). Likewise, the district court did not err in refusing to suppress the evidence in question.

Another point raised on appeal is the defendants' contention that by reason of the action of the State Department they had been deprived effectively of their right under the Sixth Amendment to have compulsory process for obtaining the attendance of witnesses in their behalf.

On October 30, 1963, the State Department caused a diplomatic note to be sent from the United States Mission to the United Nations to the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations concerning the involvement of Olenov, Pavlov and Romashin in espionage activities against the United States. In that note, the three accredited representatives of the Soviet mission were declared *persona non grata* because they had violated § 13(b) of the Headquarters Agreement between the United Nations and the United States, 22 U.S.C.A. § 287, note. The note requested that the three named representatives depart the United States on or before November 1, 1963. On the latter date counsel for Butenko, in a telegram addressed to the State Department, requested a stay of terms of the diplomatic note to give him an opportunity to confer with the three representatives before they departed. On the same day the State Department sent a telegram to Butenko's counsel advising him that the departure request would be superseded until November 4, 1963. However, the three Soviet representatives departed

the same day the telegrams were exchanged. From the time they departed, the precise whereabouts of the three Soviet representatives were unknown to defendants. The prosecution admits that they were beyond the jurisdiction of the district court.

Some months before the trial, District Judge Anthony T. Angelli signed an order on August 6, 1964, granting Butenko's request to take the deposition at government expense of the three former Soviet representatives to the United Nations, provided that Butenko could show that the three representatives would be willing to testify at oral deposition and that the Soviet Union would permit such an examination or would insist that Letters Rogatory be used. Approximately a month later, Butenko's counsel informed the district court that he was unable to secure any answer from the Soviet authorities with regard to the satisfaction of the conditions of the Court's order of August 6th, and requested a continuance for additional time to obtain a response from the Soviet government. The request was denied, the Court stating that more than sufficient time had been allowed to appellants.

It is submitted that the United States is not to be penalized for the inability of defendants to summon the three former Soviet representatives in their defense nor be required to forgo prosecution until it produces those three individuals. By virtue of § 15 of the Headquarters Agreement the three Soviet representatives were "entitled in the territory of the United States to the same privileges and immunities, subject to the corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it." A diplomatic envoy accredited to the United States is immune from compulsory process to testify in a court of the United States. Rev. Stat. § 4063, 22 U.S.C.A. § 252; *Dupont v. Pichon*, 4 U.S. (4 Dall.) 321 (1805); Restatement (Second), Foreign Relations Law § 73. Such immunity may be waived only on behalf of the sending state. Restatement (Second), Foreign Relations Law § 79. Here

the State Department treated the three Soviet representatives as having been entitled to diplomatic immunity.³ To end that status the State Department declared them to be *persona non grata*. Although their diplomatic immunity ended when they departed, all three from the time of their departure were beyond the jurisdiction of the district court and not available for any purposes to either the United States or the defendants.

But even if the State Department had not made the declaration and the three representatives had remained in the United States, there has been no showing that the Soviet Government would have waived the diplomatic immunity of the three and permitted them to testify in court and even indicate what they would say if they were permitted to testify. On the contrary, the record shows that the Soviet authorities have ignored the request by counsel for Butenko for permission to permit the three former representatives to testify by deposition or answer Letters Rogatory. Since the immunity is waived by the Sovereign and not the individual, as indicated, there is no showing that it would be waived or that their testimony would be favorable to the defense. Accordingly, no prejudice is found by reason of their departure.

Next, defendants claim the trial court committed reversible error in refusing to permit counsel to examine memoranda and reports of government agents which related to the subject matter of the indictment but not to the direct testimony of the agents who testified on behalf of the prosecution. In other words they contend that where an agent participated in more than one aspect of an investigation, but is called upon by the prosecution to testify only as to less than all of those aspects, his report relating to all other phases must be provided for the bene-

³ See *Arcaya v. Paez*, 145 F. Supp. 464, *aff'd* 244 F. 2d 958 (C.A. 2, 1956).

fit of defense counsel pursuant to subsection (b) of § 3500 of the so-called Jencks Act, 18 U.S.C.A. § 3500(b).

During the course of the trial, after government agents testified on direct examination, the prosecution made available to defense counsel those reports which it believed related to the testimony given by that particular witness. In each instance the trial judge declared a recess for the purpose of his examining those reports to determine whether he should order the prosecution to deliver them to defendants for their examination and use. After he had examined the reports, the trial judge found that they did not relate to the subject matter to which the witness had just testified on direct examination. He therefore refused to instruct the prosecution to deliver them directly to the defendants.

Before a defendant is entitled to the delivery of a statement it must not only be one within the meaning of subsection (e) of § 3500, but it must also comply with the provisions of subsection (b) of this section.⁴ Clearly if the entire statement does not relate to the subject matter of the indictment or information, the defendant is not entitled to a delivery of that statement over the objection of the prosecution. *Rosenberg v. United States*, 360 U.S. 367, 370 (1959). And in our opinion a defendant is not entitled to statements when they do not relate to the subject matter as to which the witness has testified on direct examination, even though they relate to the subject matter of the indict-

⁴ Section 3500(b) of the Jencks Act provides: "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which *relates to the subject matter as to which the witness has testified*. If the entire contents of any such statement *relate to the subject matter of the testimony of the witness*, the court shall order it to be delivered directly to the defendant for his examination and use." (Emphasis added.)

ment, information or investigation. See, for example: *United States v. Donlon*, 256 F. Supp. 336, 341-343 (D.C. Del. 1966), *aff'd* per curiam 370 F. 2d 987 (C.A. 3, 1967); *United States v. Birnbaum*, 337 F. 2d 490, 497-498 (C.A. 2, 1964); *United States v. Heap*, 345 F. 2d 170 (C.A. 2, 1965); *United States v. Umans*, 368 F. 2d 725, 731 (C.A. 2, 1966); *Williamson v. United States*, 365 F. 2d 12, 15-16 (C.A. 5, 1966); *Oertle v. United States*, 370 F. 2d 719, 723-725 (C.A. 10, 1966). In addition to setting forth the conditions under which it was to be delivered over to the defendant, Congress was very careful in limiting the type of statement that was to be so delivered. Subsection (b) contains but two sentences. In the first Congress referred to the statement as one which relates to the subject matter "as to which the witness has testified." In the second as being one which relates to the subject matter of "the testimony of the witness." And in subsection (c) to this section it refers to the statement twice as one which does not relate or relates to the subject matter of "the testimony of the witness."⁵

Other points raised by the appellant are devoid of merit and are not discussed.

⁵ Senate Report No. 981 to the bill to amend the Criminal Code to provide for the production of statements and reports of government witnesses refers to them as follows:

"... relating to matter as to which the witness has testified.";

"... touching the events and activities as to which a government witness has testified at trial,";

"... relate to the subject matter of the testimony of the witness.";

"... relate to the testimony of the witness at trial.";

and

"... relates to the testimony of the witness."

See 1957 U.S. Code Cong. and Adm. News 1861, at 1862 and 1864.

The judgment in appeal No. 15170 as to Ivanov is affirmed as to count I and a judgment of acquittal is directed to be entered on count II thereof. The judgment in appeal No. 11232 as to Butenko is affirmed on all counts.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

Judgment of the Court of Appeals

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is nowhere ordered and adjudged by this Court that the judgment of the said District Court, filed December 18, 1964, be, and the same is hereby affirmed as to Count I and the District Court is directed to enter a judgment of acquittal as to Count II of the said judgment.

ATTEST:

THOMAS F. QUINN
Clerk

October 6, 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1007 Misc.

JOHN WILLIAM BUTENKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 885

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, which is not
officially reported, is printed in the appendix to the
petitions.

(1)

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1967. By orders of October 25, November 3, and November 14, 1967, Mr. Justice Brennan extended the time for filing the petitions for certiorari herein to December 5, 1967, and they were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED*

1. Whether the trial judge, who examined the reports of the agents who testified at trial, properly determined that certain of the reports did not relate to their direct testimony.

2. Whether, in the circumstances of this case, petitioners were prejudiced by the fact that the three co-conspirators who had diplomatic immunity were declared by the United States Government to be *persona non grata* and directed to depart from the country.

3. Whether there was probable cause for the arrest of petitioner Ivanov which justified the search of the automobile in which he was riding.

4. Whether the evidence was sufficient to sustain Ivanov's conviction.

*With regard to fn. 1 appended to the statement of "questions presented" in No. 885, it has been determined that there is nothing to disclose pursuant to the policy of the Department of Justice as described to this Court in the government's memorandum opposing rehearing recently filed in *Kolod et al. v. United States*, No. 133.

STATEMENT

After a jury trial in the District of New Jersey, petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. 794 (a) and (c) (Count One), and of conspiring to violate 18 U.S.C. 951 by causing Butenko unlawfully to act as an agent of the Soviet Union without prior notification to the Secretary of State (Count Two). Butenko was also convicted of the substantive offense of unlawfully acting as an agent of the Soviet Union in violation of 18 U.S.C. 951 (Count Three). Butenko received concurrent sentences of 30 years, 10 years and 5 years' imprisonment on the three counts on which he was convicted, and Ivanov received concurrent sentences of 20 years' imprisonment on Count One and 5 years on Count Two. The court of appeals affirmed the conviction of Butenko on all counts, affirmed Ivanov's conviction on Count One, but set aside his conviction on Count Two.¹

The government's evidence at trial established that petitioners were engaged in a conspiracy with three Russian diplomats, Gleb A. Pavlov, Yuri A. Romashin, and Vladimir I. Olenov, to transmit to the Soviet Union information relating to the command and control system of the Strategic Air Command of the United States Air Force.

Butenko, an American citizen, was employed by the International Electronic Company which was under

¹ The court of appeals held that the government had failed to prove that Ivanov knew that Butenko had not registered with the Secretary of State and, therefore, reversed the conviction on Count Two. The government is not seeking review of that ruling by the court of appeals.

contract with the United States Air Force to produce a command and control system for the Strategic Air Command (R. 114).² This system, which includes data processing and computer programming equipment, is designed to store and transmit operational information such as the location of aircraft and distances from targets which will enable the commander of the Strategic Air Command to alert and execute all his forces at an extremely rapid rate and provide him with up-to-the-minute information on the status of the total force. By combining the data programmed into the system with current information which it receives, the command system allows the SAC commander instantly to form a plan of attack and to calculate the number of aircraft or missiles needed, the refueling problems and the attrition rate (R. 111-114, R. 1769). The information supplied by the system may be provided either as a picture projected on a screen or printed in page form (R. 114).

Butenko, who had top-secret clearance, was Control Administrator for the project's field operations division, which was responsible for the development of installations at the various air and missile bases (R. 116-118). Butenko's top-secret clearance gave him access to "top-secret," "secret" and "confidential" documents, and "secret" and "confidential" documents passed through his division in the normal course of its operations.

Butenko's illegal involvement with petitioner Ivanov and the officials of the Soviet Union was es-

² References in the form "R." are to the stenographic transcript of the trial and references in the form "M. Tr." are to the transcript of the pre-trial hearing on the motion to suppress.

established by the testimony of agents of the Federal Bureau of Investigation who surveilled several meetings which Butenko had with the Russians and who arrested petitioners on the evening of October 29, 1963.

April 21, 1963

At 6:34 p.m. on this date a station-wagon owned by Amtorg Trading Company and driven by Gleb Pavlov left petitioner Ivanov and Vladimir I. Olenov at a restaurant in Closter, New Jersey (R. 347-359, 480-483). Pavlov continued driving, and after making a series of U-turns parked opposite the China Chalet Restaurant in Closter at approximately 7:00 p.m. At that time Butenko drove his car into and through the China Chalet parking lot, and about a minute later Pavlov and Butenko met in the parking lot of a nearby supermarket (R. 360-361, 645, 480-481). Pavlov left his car emptyhanded and entered Butenko's car. After a short time he emerged carrying a tan briefcase (R. 361-362, 536-538, 586). Pavlov then returned to the restaurant, where he had left Ivanov and Olenov. At approximately 8:05 Pavlov rejoined Butenko and the two of them went to a different restaurant (R. 365, 484-485, 540). At 8:50 Pavlov left Butenko, returning shortly thereafter. Twenty minutes later Pavlov and Butenko left together (R. 366).

May 26 and 27, 1963

At approximately 6:10 p.m., on May 26th Ivanov was observed driving a station-wagon, in which Pavlov and Olenov were seated, in the vicinity of the supermarket parking lot where Butenko and Pavlov had

met on April 21. The station-wagon proceeded back and forth past the lot three or four times (R. 614-616). At approximately 7:00 p.m. Butenko, who had been observed earlier that evening leaving his home carrying a tan attaché case, drove his car into the supermarket lot (R. 589, 616-617). Within a few minutes the station-wagon, occupied only by Pavlov, entered the parking lot, turned toward Butenko's car, and drove out (R. 618). Butenko followed Pavlov and they drove past the Old Hook Inn where Ivanov and Olenov were standing on the side of the road (R. 618-619, 676-677). Ten minutes later Pavlov drove back and picked up Olenov and Ivanov (R. 737-738). At 8:00 p.m. Butenko was observed at the bar in the Florentine Gardens Restaurant. He remained there until 10:00 p.m., but on four separate occasions between 8:00 and 10:00 p.m. he left the bar and went to his car and looked in both the front and back seats as well as the trunk (R. 768-770).

The next day Pavlov was observed leaving the Soviet Mission to the United Nations carrying a reddish-brown briefcase. At 8:00 p.m. that evening Pavlov met Butenko, and when Butenko returned to his home he was carrying an identical reddish-brown briefcase (R. 825-826, 837-838, 887-889).

September 23 and 24, 1963

On September 23, 1963, Butenko was observed as he drove his car in the area of Ridgewood, New Jersey, making a series of U-turns and in general following a circuitous route (R. 910-920). This was apparently a dry-run, for the following night Butenko drove almost the identical circuitous route, eventually

arriving at the parking lot of the Gold Key Restaurant. At this time, Pavlov and Romashin were observed standing in a shopping-center parking lot across the street, looking toward the Gold Key. After ten or fifteen minutes Butenko drove out of the parking lot and was followed by Pavlov and Romashin. Later that evening, Butenko and Pavlov were observed driving together (R. 921-925).

October 29, 1963—the Night of the Arrest

From 6:00 p.m. to 6:15 p.m. on this evening, Ivanov, Pavlov and Romashin were observed walking and driving in the general vicinity of Dean Street in Englewood (R. 1022-1025). From 7:00 to 7:30 p.m. they drove in and out of and back and forth through the Englewood Railroad Station parking lot with Pavlov driving at one point and Ivanov driving at another (R. 1062-1065). At 7:37 Butenko's car entered the railroad station lot and then left. At 7:40 the Soviets entered and left the railroad station lot in their car. At 7:45 Butenko again drove in and out of the railroad station lot. At 7:55 Butenko returned to the parking lot, parked, turned off his headlights and turned on his parking lights. Within a few minutes the Soviet car, with Pavlov driving and Ivanov in the front seat, drove into the station diagonally opposite Butenko's automobile, and the headlights were turned off and the parking lights turned on. Then the Soviet car backed out of its space, came around the railroad station and parked perpendicularly to the rear of Butenko's car. After about 35 seconds the Soviet car pulled away and Butenko proceeded to follow it. The F.B.I. agents then moved in and

arrested Butenko in his car and Ivanov and Pavlov in their car. (R. 1064-1068, 1141, 1156, 1332-1333).

At the time of the arrest the agents found in the Soviet car an attaché case that Butenko had been carrying earlier that evening, which contained two International Electronic Company documents relating to the command control system that the company was developing for the Air Force (R. 1246-1249, 1291, Gov. Exhs. 28A and 28B). The agents also found in the Soviet car a document-copying camera and a film canister, as well as a radio-signaling device and receiver (R. 1163-1170, 1453-1457). At the time of the arrest Butenko had in his wallet a piece of paper on which there was a map of the route he had followed on September 23 and 24, as well as a list of 19 separate 5-digit numbers. These numbers were identified as the numbers of 19 International Electronic Company documents relating to the command control system and included the numbers of the two documents which were in the attaché case found in the Soviets' car at the time of the arrest (R. 1604-1615, Gov. Exhs. 28A, 28B, 39).

ARGUMENT

1. After the F.B.I. agents testified on direct examination at the trial, the government made available to defense counsel all the reports that related to the direct testimony. Other reports or statements prepared by the witnesses, which the government believed did not relate to the direct testimony, were submitted to the court for inspection *in camera*. After examining the reports submitted to it, the trial court determined that these were not statements to which the defendants were entitled under the Jencks Act (18 U.S.C. 3500).

(This Court has recognized that when the disputed materials have been submitted to the trial judge for his inspection and he has determined that they are not within the Jencks Act, that ruling should not be overturned unless clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 493; *Palermo v. United States*, 360 U.S. 343, 353. The statements examined by the district court in this case related to the investigation in general and not to the events and activities about which the particular witnesses testified. Thus, there is no reason to find an abuse of discretion by the trial court in this case.

2. Petitioners were not deprived of any right to compulsory process under the Sixth Amendment, or deprived of a fair trial in any respect by the action of the United States in causing a diplomatic note to be sent to the Permanent Mission of the U.S.S.R. to the United Nations declaring co-conspirators Paylov, Romashin and Olenov to be *persona non grata*, and thereby causing their departure from this country. A review of the record shows that there is no basis for petitioners' contention that the expulsion of the co-conspirators deprived the defense of the opportunity to secure the "cooperation of" the three Russian diplomats in meeting the charges.

On October 30, 1963, the United States Department of State caused a diplomatic note to be sent to the Soviet Mission to the United Nations concerning the involvement of Pavlov, Romashin and Olenov in espionage activities against the United States. Therein, the three Soviet diplomats were declared to be *persona non grata*, and it was requested that they depart

the United States on or before November 1, 1963. On that date, counsel for Butenko, in a telegram addressed to the Department of State, requested a stay of the terms of the diplomatic note in order that he might confer with the Russian diplomats. On the same day, the Department of State sent a telegram to counsel for Butenko, stating that the expulsion order would be suspended until November 4, 1963. Despite this, the three Russian diplomats departed this country on November 1, 1963.

On August 6, 1964, the district court granted Butenko's motion³ to take oral depositions of Yuri A. Romashin, Gleb A. Pavlov and Vladimir I. Olenév at the government's expense, on condition that the defense show that the witnesses were willing to testify by deposition and that the Soviet government would permit the taking of their depositions.

On October 5, 1964, immediately prior to the trial, Butenko moved for an adjournment for the purpose of determining further whether or not the terms and conditions of the court's order of August 6 could be met. At that time, counsel for Butenko represented to

³ An application for leave to take the depositions or otherwise secure the testimony of the three Soviet diplomats was never made by defendant Ivanov, who himself was a Russian national, employed by an agency of the U.S.S.R. However, in the course of argument of Butenko's motion for an adjournment to determine whether the deposition could be obtained, counsel for Ivanov stated that it was his position that such an application on his part was unnecessary, because any deposition which might be taken would require Ivanov's counsel's presence, since testimony would be given which would be used at the trial. Ivanov did not represent to the court that any attempt had been made on his part to communicate with the Soviet authorities regarding Butenko's application to take depositions or to send Letters Rogatory.

the court that he had thus far been unable to secure any answer from the Soviet authorities with regard to satisfaction of the conditions of the court's order. This request for adjournment was denied on the ground that more than ample time had been provided within which the terms and conditions of the court's order could be met.

Pursuant to Section 15 of the "Headquarters Agreement," the co-conspirators Pavlov, Romashin and Olenov were "entitled in the territories of the United States to the same privileges and immunities, * * *, as is accorded to diplomatic envoys to it." In accordance with the provisions of 22 U.S.C. 252, accredited diplomatic envoys are immune from civil and criminal process of the United States courts. Accordingly, as accredited representatives of the Permanent Mission of the U.S.S.R. to the United Nations, compulsory process could not attach to Pavlov, Romashin and Olenov (R. 3917). See *In re Dillion*, Fed. Cas. No. 3,914 (N.D. Cal. 1854).

We submit that since the testimony of the three Soviet diplomats could be secured only through their wholly voluntary cooperation, it is immaterial whether they were afforded an opportunity to cooperate voluntarily in this country, or whether that opportunity was afforded to them some place in the Soviet Union.* By its order of August 6, 1964, the district court established sufficient means whereby the defendant could secure and preserve the testimony of the co-conspirators if they were willing to so testify. The actions of the Department of State in suspending its order of

* This is particularly true where a Soviet national is on trial and that government has guaranteed his presence at the trial.

November 1st to November 4, 1963, showed the good faith intentions of the United States Government to cooperate with counsel for Butenko if the Russian diplomats were so disposed.

As the Second Circuit recognized in *United States v. Greco*, 298 F. 2d 247, 251, certiorari denied, 369 U.S. 820:

* * * the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it: * * * The fact that appellant could not compel the attendance of * * * witness[es] * * * did not deprive him of any constitutional right.⁵

This is not a case like *United States v. Powell*, 156 F. Supp. 526 (N.D. Cal. 1957). In *Powell*, the only factor which prevented the possible attainment of witnesses on behalf of the defense was the refusal of the United States to issue a passport. Here, compulsory process was never available because the diplomatic status of the three co-conspirators meant that they could appear as witnesses only through their voluntary acts. The declaration that the three were *persona non grata* did not prevent them from cooperating with the defense either in this country or in Russia under the court's order of August 6, 1964.

3. There is no merit to petitioner Ivanov's contention that the F.B.I. agents did not have probable cause to arrest him without a warrant and to search his car on the evening of October 29, 1963. A review

⁵ See, also, *Gorin v. United States*, 313 F. 2d 641 (C.A. 1); cf. *Earl v. United States* (C.A.D.C., No. 19316, decided April 25, 1966).

of the record demonstrates that the agents' observations of Ivanov's activities on that evening, coupled with their knowledge of his prior activities and those of his co-conspirators, gave the agents probable cause to believe that he was an active participant in the conspiracy to transfer to the Soviet Union information relating to the national defense of the United States.

On the evening of April 21, 1963, Ivanov had been observed in the company of Pavlov just prior to his meeting with Butenko. The surveillance of the activities of Butenko and Pavlov later that evening gave the agents reasonable grounds to believe that Butenko delivered a briefcase to Pavlov, who gave it to Olenov and Ivanov for a short time and then retrieved it from them and delivered it back to Butenko's car. On May 26, 1963, Ivanov was observed driving with Pavlov back and forth past the parking lot where Pavlov later met Butenko and the surveillance of Butenko and Pavlov on that and the following day again gave the agents reasonable grounds to believe that Butenko had delivered documents to Pavlov which were later returned to him.

Any doubt that might have existed concerning Ivanov's involvement in the conspiracy was dissipated by the agents' observations of his activities prior to his arrest on the evening of October 29. Ivanov and Pavlov shared the driving that evening as they drove back and forth through, and in and out of, the parking lot at the Englewood Railroad Station in an obvious effort to assure themselves that they were not under surveillance. Ivanov was then in the car when, after the parking-light signal

was exchanged with Butenko, the Soviet car drove up and stopped perpendicularly to Butenko's car. These activities clearly gave the agents probable cause to believe that Ivanov knew the nature of the activities in which he was engaged and was far from an innocent bystander.

Since the agents did have ample probable cause to believe that Ivanov was an active member of the conspiracy, they were justified in arresting him without a warrant and searching the car. *Brinegar v. United States*, 338 U.S. 160; *Draper v. United States*, 358 U.S. 307.*

4. The above review of the evidence of Ivanov's participation in the conspiracy also demonstrates that the evidence was sufficient to warrant his conviction. The additional fact that documents relating to the command control system were found in the car with Ivanov at the time of the arrest, together with photographic equipment and electronic signalling devices, further substantiates his guilt.

* The attaché case containing the documents was removed from the Soviets' car at the time of the arrest (M. Tr. 151-152). The contents of the shopping-bags found in that car were thoroughly examined at the time of the arrest but were not actually removed until the car was brought to the Hackensack office of the F.B.I. (M. Tr. 125-127, R. 1156-1174). The trial judge correctly concluded that "[i]t was reasonable * * * for the agents not to remove the items from the automobile until their arrival at Hackensack" (M. Tr. 162).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals as to both petitioners should be affirmed.

Respectfully submitted.

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Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

JANUARY 1968.

JAN 23 1968

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. ~~100~~ /1

IGOR A. IVANOV, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit**

**MOTION TO AMEND THE PETITION FOR CERTIORARI
BY ADDING AN ADDITIONAL QUESTION
PRESENTED**

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Washington, D. C. 20006
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 885

IGOR A. IVANOV, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit

**MOTION TO AMEND THE PETITION FOR CERTIORARI
BY ADDING AN ADDITIONAL QUESTION
PRESENTED**

Petitioner Igor A. Ivanov, through his undersigned counsel, moves this Court for leave to amend the petition for certiorari filed on his behalf by adding thereto the following additional "Question Presented":

5. Whether, when the Department of Justice has in its possession recordings of a criminal defend-

ant's voice—or of the voice of a co-defendant—obtained through electronic surveillance, the Department may refuse unqualifiedly to disclose the existence and contents of those recordings unless in its untrammelled discretion, free from judicial control, it determines *both* that the surveillance “is or may be unlawful” and “that the government has thereby obtained any information which is arguably relevant to the litigation involved.”

In support of this motion, petitioner invites the Court's attention to footnote 1 in the Petition for Certiorari filed herein on December 5, 1967. In that footnote, it was stated that no question was presented concerning illegal electronic surveillance on the assumption that, were there any, the Solicitor General would disclose its existence. The Solicitor General has responded, citing his Memorandum in Opposition to Rehearing in *Kolod v. United States*, No. 133, October Term, 1967, and stating that the Department is relying on the position set forth in that memorandum as the basis for a refusal to make any statement concerning the existence *vel non* of electronic surveillance in this case. This position, first explained and justified in the *Kolod* memorandum, filed on or about January 8, 1968, gives rise to the additional question here set forth.

The question thus raised is virtually identical to that presented by the Petition for Rehearing in *Kolod* and petitioner respectfully asks the Court to consider in support of this motion, and—should this motion be granted—in support of the amended Petition for Certiorari, all the arguments set forth in the *Kolod* Petition as well as in the *Kolod* Reply Memorandum to Memorandum of the United States in Opposition.

In addition, petitioner notes that the chairman of the ex parte and secret Justice Department committee which reviews electronic surveillance materials is himself a signatory to the Brief for the United States in Opposition filed herein. Mr. Yeagley's personal involvement on the prosecution side of this case emphasizes the questions of fairness and fitness to judge one's own cause tendered by the *Kolod* rehearing petition. Cf. 5 U.S.C. § 554(d) (internal separation of functions in administrative proceedings).

The United States' position in this case, coming so closely upon the heels of its *Kolod* memorandum, underscores the importance to the administration of federal criminal justice of a declaration by this Court concerning the propriety of the Department's self-adopted and self-serving policy.

WHEREFORE, the petitioner respectfully prays that the Court permit amendment of the "Questions Presented" in the Petition for Certiorari by the addition of the additional Question tendered herein.

Respectfully submitted,

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Counsel for Petitioner

January 1968

JAN 23 1968

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. **11**

IGOR A. IVANOV, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit**

REPLY BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 885

IGOR A. IVANOV, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

As to Question One

The government relies upon the "clearly erroneous" standard enunciated in *Campbell v. United States*, 373 U.S. 487, 493 (1963), and *Palermo v. United States*, 360 U.S. 343, 353 (1959). This reliance is wholly misplaced, for the issue tendered in Question One concerns the standards to be applied in making findings on pro-

ducibility under the Jencks Act, and not the record support for findings of fact made upon a legal premise shared by the government and the defense. This distinction should not be unfamiliar to the government, as it was successfully urged upon the Second Circuit by the prosecution in *United States v. Aviles*, 337 F.2d 552, 556-57 (2d Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). In *Aviles*, the court reiterated that "findings of fact that are induced by an erroneous view of the law are not binding." *Id.* at 557.

The government's argument does not, therefore, touch the central contention advanced in support of a grant of certiorari on Question One: namely, the need for an early and precise definition by this Court of the Jencks Act limiting phrase "related to the subject matter as to which the witness has testified."

As to Question Three

The government states at p. 13 of its brief: "The surveillance of the activities of Butenko and Pavlov later that evening [April 21, 1963] gave the agents reasonable grounds to believe that Butenko delivered a briefcase to Pavlov, who gave it to Olenov and Ivanov for a short time and then retrieved it and delivered it back to Butenko's car." This statement is without basis in the record. The sole evidence adduced by the government concerning Ivanov's actions on April 21 was as follows: Ivanov and Olenov were let out of the Soviet automobile at Lou's Hitching Post shortly after 6:30. Pavlov drove onto meet Butenko six miles away, apparently received a briefcase from him, then drove back to Lou's Hitching Post, arriving there *after* 7:15. But the FBI last saw Ivanov and Olenov in Lou's at 7:15, and the record contains no evidence of Ivanov's

activities thereafter. Petition for Certiorari, pp. 5-6. Thus, there is no support for the assertion that agents could reasonably believe that Pavlov passed a briefcase to Ivanov and Olenov. Nor, it follows logically, is there any support for an inference that Pavlov retrieved the briefcase, or that he "delivered it back to Butenko's car." The contention that such an inference might reasonably be made is, moreover, wholly new to the government's position, as examination of its brief in the Court of Appeals reveals. See Brief and Appendix for Appellee, *United States v. Butenko & Ivanov*, No. 15,170, 3d Circuit, pp. 9, 55, 58.

Not only that, but the FBI agents who testified at the motion to suppress hearing never referred to any belief in the passage of a briefcase, let alone to any "reasonable grounds" for such a belief.

The government's factual position on the issue of probable cause is, therefore, an essay in groundless speculation.

As to the Government's Conclusion

The government urges, in the conclusion to its brief, that the "judgment of the court of appeals as to both petitioners should be affirmed." Petitioner agrees with the government that this Court should reach the merits of the present case, but relies upon the Court's own study of the record for the proper outcome.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1007 Misc.

JOHN WILLIAM BUTENKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 885

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**MEMORANDUM IN RESPONSE TO MOTION TO AMEND THE
PETITION FOR CERTIORARI**

Petitioner Ivanov has submitted a motion to amend the petition for a writ of certiorari to add a question concerning the government's possession of recordings of the voice of any defendant or codefendant. In our brief in opposition in these cases we advised the Court (with regard to electronic surveillance) that "it has been determined that there is

nothing to disclose pursuant to the policy of the Department of Justice as described to this Court in the government's memorandum opposing rehearing recently filed in *Kolod et al. v. United States*, No. 133." In light of the Court's subsequent order in *Kolod*, however, we agree that the instant cases should be remanded to the district court.

In the Motion to Modify the Order of the Court which we have submitted in *Kolod, et al. v. United States*, No. 133, we have set forth the reasons and authority which we believe support the view that this Court's order remanding that case should provide that the records of electronic surveillance be submitted for an *in camera* inspection to the district judge, who may then order any further proceedings which he finds warranted.

This case arises from an investigation affecting the national security. Here, it cannot be doubted that public disclosure of the materials involved "might reveal the inner workings of the investigative process and thereby injure the national interest." *Palermo v. United States*, 360 U.S. 343, 350. See, also the concurring opinion of Mr. Justice White in *Katz v. United States*, No. 35, decided December 18, 1967. The obvious public interest in preventing the unnecessary disclosure of such material provides additional support for the adoption of the procedures suggested in our Motion in *Kolod*.

In the circumstances, we believe the Court should grant certiorari, vacate the judgment below, and remand the cases to the district court with instructions

to conduct an *in camera* inspection of the fruits of any electronic eavesdropping to determine the necessity of compelling the government to make disclosure of those materials to the defendants.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. ~~100~~ 11

IGOR A. IVANOV, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY MEMORANDUM TO MEMORANDUM IN
RESPONSE TO MOTION TO AMEND THE
PETITION FOR CERTIORARI

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IN THE
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OCTOBER TERM, 1967

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IGOR A. IVANOV, *Petitioner*

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**REPLY MEMORANDUM TO MEMORANDUM IN
RESPONSE TO MOTION TO AMEND THE
PETITION FOR CERTIORARI**

This memorandum is filed simultaneously with Memorandum in Opposition to Motion to Modify the Order of the Court, *Kolod v. United States*, No. 133. Just as the memorandum of the Solicitor General to which this memorandum is addressed incorporated by reference the arguments made for the government in *Kolod*, so this memorandum relies upon the arguments made by counsel for the petitioners in No. 133 (two of whom are also counsel for Ivanov).

The Solicitor General has suggested that the presence in this case of a national security issue is an additional reason for requiring a closed hearing. He rests upon *Palermo v. United States*, 360 U.S. 343 (1960), apparently for the proposition that the inner workings of the investigative process should not be revealed when the government has trespassed upon the Fourth Amendment while trying to catch a spy. He also cites Mr. Justice White's concurring opinion in *Katz v. United States*, 36 U.S.L. Week 4080, 4084 (December 19, 1967), apparently suggesting thereby that the Fourth Amendment warrant requirement is *pro tanto* suspended when the government suspects espionage.

The first of these propositions is set at rest by *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cited with approval, *Dennis v. United States*, 384 U.S. 855, 873 n. 20 (1966), and by the cases cited in the Memorandum in Opposition filed this day in *Kolod*, No. 133.

The second proposition renders the Solicitor General's argument as to the scope of a hearing superfluous. For if it be contended the government may constitutionally engage in warrantless and generalized wiretapping* and electronic eavesdropping to catch a spy, then a hearing in the district court would first address itself to whether that proposition of law is a valid one and whether the facts of this case justify its application. Resolution of this issue would require inquiry into the manner and extent of surveillance, through examination of the agents responsible. Only if this preliminary question is resolved adversely to

* The prohibition of 47 U.S.C. § 605 is, of course, absolute.

the government need there be inquiry into the kind of a hearing that ought to be held on the extent of the taint. In any event, the *Kolod* memorandum establishes that petitioner is at least entitled to production of *his own* recorded statements.

Taking the contention as to legality *vel non* on the merits, we regard it as a closed issue in the law of illegal search. The Fourth Amendment was born in a time of national turmoil, out of a system of legal rules built to ensure that government, when defending itself against evils that threatened its security and perhaps even its existence, did not employ means destructive of the freedoms that a system of laws is designed to protect.

The case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), often cited in this Court's reports, involved papers deemed heinously libelous and potentially subversive of the public order, yet the authors of the search were brought to judgment for a trespass. The smuggling and tax refusal against which writs of assistance were used in colonial Massachusetts manifested disloyalty to the British crown and threatened the security of British rule, yet the writs have been consistently denounced in our jurisprudence. *Boyd v. United States*, 116 U.S. 616, 625 (1886).^{*} We do not understand even Mr. Justice White to have advocated renunciation of the Fourth Amendment's "general search" prohibition, but his apparent support for the "executive warrant", see *Frank v. Maryland*, 359 U.S. 360, 363 (1959) (quoting *Boyd*), runs counter to the Fourth Amendment decisions of this Court.

^{*} Compared to the governmental misconduct here under examination, writs of assistance, as Mr. Justice Brandeis said, were but "puny instruments of tyranny." *Olmstead v. United States*, 277 U.S. 438, 476 (1928).

It is fitting that it should be so. For to carve out an exception to Fourth Amendment freedoms in the very field where passion is most likely to set fire to the reason of executive officers abdicates judicial responsibility precisely where its exercise is most needed.

We believe, however, that this question cannot be settled upon the present record, bereft as it is of any information concerning the nature and extent of the invasion of privacy in this case, the authorization—if any—for the search, and the manner in which the fruits of the unlawful activity were used.

Petitioner consents, therefore, to the course suggested by the Solicitor General, assuming that the order of the Court will adequately preserve petitioner's right to appropriate review of Questions 1 through 4 presented by the petition for certiorari,* and subject to the condition that a hearing on the electronic surveillance be an "adversary proceeding" as defined in the foregoing memorandum and the Memorandum in Opposition filed this day in *Kolod*, No. 133.

Respectfully submitted,

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* With reference to Question 1, for example, it may well be additional Jencks statements of the FBI agents who testified at trial will now prove to be available.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1007 Misc.

JOHN WILLIAM BUTENKO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Petitioner Ivanov suggests that the government is arguing that where it has used electronic surveillance to catch a spy, the spy should not be allowed to challenge the legality of that surveillance. However, that is not the government's position.

We believe that an examination of the logs of the overheard conversations involving petitioners will clearly establish that nothing arguably relevant to this

case was overheard. Thus, the government is not contending here that spies should be foreclosed from challenging the legality of any electronic surveillance used to obtain evidence that was in any manner used against them. Rather, the government is contending only that, in light of the fact that the electronic surveillance did not produce any evidence or leads to evidence, there is no reason to compel the government to disclose to anyone but the court the manner and means by which it conducts investigations in areas affecting national security.

We submit that in this case an *in camera* inspection of the logs of all overheard conversations involving petitioners will adequately protect both the rights of petitioners and the public interest.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1968.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 11

IGOR A. IVANOV, *Petitioner,*

V

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER IGOR A. IVANOV

JURISDICTION

The opinion of the Court of Appeals, reported at 384 F.2d 554 (3d Cir. 1967), was rendered with its judgment on October 6, 1967. By order of October 25, 1967, Mr. Justice Brennan extended the time for filing the petition for certiorari to and including November 25, 1967. By order of November 14, 1967, Mr. Justice Brennan extended the time for filing the peti-

tion for certiorari to and including December 5, 1967. A motion to amend the petition for certiorari was filed January 23, 1968 and granted June 17, 1968. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Igor A. Ivanov, a citizen and national of the U.S.S.R. and an employee, during the relevant time period, of the Soviet trading company, Amtorg, was convicted of conspiracy to transmit to the U.S.S.R. information relating to the national defense, 18 U.S.C. § 794(a), (c), and of conspiring to violate the foreign agent registration provisions of 18 U.S.C. § 951. His conviction upon the latter count was reversed by the court of appeals. His co-defendant in the trial court, John W. Butenko, is petitioner in No. 197. The facts of this case are set out in the petition for certiorari, and in the opinion of the court of appeals.

The petition for certiorari raised four questions, but contained the following footnote to the "Questions Presented:"

"1 No question is raised concerning illegal electronic surveillance, on the assumption that the Solicitor General will, if there was any, disclose its presence. See Petition for Rehearing, *Kolod v. United States*, No. 133, October Term, 1967."

The Solicitor General responded as follows:

"* With regard to fn. 1 appended to the statement of 'questions presented' in No. 885, it has been determined that there is nothing to disclose pursuant to the policy of the Department of Justice as described to this Court in the government's memorandum opposing rehearing recently filed in *Kolod et al. v. United States*, No. 133. Brief for the United States In Opposition, p. 2."

Petitioner promptly moved to amend the petition for certiorari to raise the additional question presented by the Solicitor General's obfuscatory reticence. As phrased in the motion, the question was:

"5. Whether, when the Department of Justice has in its possession recordings of a criminal defendant's voice—or of the voice of a co-defendant—obtained through electronic surveillance, the Department may refuse unqualifiedly to disclose the existence and contents of those recordings unless 'in its untrammelled discretion, free from judicial control, it determines *both* that the Surveillance 'is or may be unlawful' and 'that the government has thereby obtained any information which is arguably relevant to the litigation involved.'"

Then the Court decided *Kolod v. United States*, 390 U.S. 136 (1968). The Solicitor General responded ("Response to Motion to Amend the Petition for Certiorari"), consenting to the amendment, and confessing that the court of appeals' judgment should be vacated and the cause remanded to the district court for a hearing or illegal electronic surveillance. Petitioner agreed to this proposal, upon the assumption that such a course would preserve to him his right to have all his claims of error presented in a petition for certiorari at some point.

This Court, on June 17, 1968, granted the motion to amend and the petition for certiorari, limiting its grant to the following questions:

"On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

(1) Should the records of such electronic surveillance be subjected to in camera inspection by

the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

(2) If in camera inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?"

Petitioner adopts the position of petitioners in No. 133, October Term 1967, *Alderman v. United States*, as to the issues set out in the Court's question, and notes as well the substantial similarity of views between this brief and that filed on behalf of petitioner Butenko in No. 197. Petitioner will seek not to repeat arguments made in those briefs since the cases have been consolidated for argument and counsel have extensively discussed the cases among themselves and have come to adopt a substantially similar approach.

ARGUMENT

I. ADVERSARY PROCEEDINGS, WITH FULL DISCLOSURE OF ALL SURVEILLANCE OF PETITIONERS, IVANOV AND BUTENKO, OR OF THEIR PREMISES, AND OF THE UNINDICTED ALLEGED CO-CONSPIRATORS, ARE CONSTITUTIONALLY REQUIRED.

A. Relevancy

The object and end of a suppression inquiry is "relevancy"—in the sense of relation of the primary illegality to the government's proof:

"the exclusionary rule has no application . . . [when] the Government learned of the evidence 'from an independent source.' . . . [or when] the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

See Pitler, "*The Fruit of the Poisonous Tree*" *Revisited and Shepardized*, 56 Calif. L. Rev. 579, 593 (1968). The decision of the trial court on a suppression motion is thus a determination of fact concerning an essentially "causal" question. Did the challenged evidence arise from, or may it be traced to, an illegal source?² In an electronic surveillance case, this question is quite difficult to define, for the instances of

¹ In this case, the testimony of FBI agents was extensively used in proof of the alleged conspiracy. If any of these agents participated in the illegal surveillance, the logs and summaries of their activity may be producible under the Jenks Act, 18 U.S.C. § 3500. This issue would require further exploration in the trial court upon remand and petitioners do no more than mention it.

² A perceptive and scholarly approach to this problem is taken in *United States v. Schipani*, 63 CR 237 (E.D.N.Y. Jul. 26, 1967) (Weinstein, J.).

governmental illegality in this sphere, and the uses to which the unlawfully-gained evidence may be put, are myriad.³ The question is not, as in a typical narcotics case, "did this piece of verbal evidence, unlawfully obtained, lead the police to the defendant's heroin cache?" It is far more complex than that posed by a blurted-out two or three sentences in a laundry on Leavenworth Street. See *Wong Sun v. United States*, 371 U.S. at 474, 487-88. It is that posed by hundreds and thousands of sentences and bits of private conversation recorded, noted, taken down, and then carefully masked behind such terms as "confidential informant" and filed away for retrieval by government agents and government lawyers when a prosecution impends. The files are there and remain. The administration in office at this writing has said that it plans no more additions to these files, but this administration will not always be in office and the Crime Control Act, Pub. L. 90-351, gives additional reason carefully to consider the problem as a current one. And of course even this administration will continue its surveillances in "national security" cases, whatever that term may come to mean. A final point in introduction: the burden of proof is the government's. The government must convince a judge that its evidence is lawfully-obtained. Petitioners take it that doubt on this score was dispelled by *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), and now the matter is settled by *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n. 18 (1964), and *United States v. Wade*, 388 U.S. 218, 241 (1967). This is the conclusion also of the District of Columbia Circuit, *Baker v. United States*, No. 21, 154 (Aug. 9, 1968), slip op., p. 48. See *United States v. Schipani*, *supra* note 2. But settled or no, common sense dictates that

³ See the instances and uses recounted in the brief in *Alderman*, Point I.

the government, in possession of the stolen goods and responsible for mixing them up with lawfully-obtained materials, should have the obligation to sort out the information and show itself to be innocent.^{3a}

If the above correctly sets out the parameters of the inquiry, then it remains to ask: How should the question of relevance be decided? The government seeks to invoke summary procedures and *in camera* determinations. Perhaps this question can best be seen out of the light of emotional discourse and in the perspective of history. The preference for taking testimony in open court as a means of solving issues of fact is an old one. On the law side of the courts, it has roots in the 16th century at the latest. Smith, *De Republica Anglorum*, Bk. 2, ch. 15 (1583). Trial by deposition was abolished on the equity side of the federal courts in 1912, save for "good and exceptional cause." See Lane, *The Federal Equity Rules*, 46 Harv. L. Rev. 638, 651 (1933). The limited grant of summary judgment power under the Civil Rules, F.R.Civ.P. 56, has been interpreted by this Court narrowly, at least when the values of adversary inquiry are in the balance, and these values are always in the balance when the proof is in the hands of one party and "hostile witnesses thicken the plot."⁴ *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944). The reasons for these decisions are persuasive and help solve the problem which is before the Court. The government has all the evidence. If it says "X is so," and swears to it, there is nothing petitioner can do to rebut that contention. The only way petitioner *can* make rebuttal

^{3a} Compare Prosser, *Torts* §§ 39-40 (3d ed. 1964).

⁴ These "hostile witnesses" have even been found lurking in bedchambers, *Black v. United States*, 385 U.S. 26 (1966), and antechambers.

is through cross-examination of live witnesses and examination of logs and summaries.⁵ Moreover, even in a "trial by affidavit," conclusory assertions are disfavored and the proceedings are adversary in form. See *Coplon*, 185 F.2d at 638-39.

In the process of determining whether the government's case is tainted, there is but one way logically to proceed. If the proposition be accepted that the government must demonstrate either that its proof had an independent source or that the evidence it wishes to use is so far removed from the primary illegality as to dissipate the taint, see *Wong Sun*, 371 U.S. at 487, it must prove, in essence, a lack of casual connection. In the "independent source" instance, the government cannot, as a matter of simple logic, demonstrate that its case is free of taint without tracing from the illegality to its evidence, and showing that none of the illegal material was used. An attempt to pursue an alternative source, for example by showing that its case had a "legal" source, is patently inadequate, for while such a technique may establish that one possible source of the disputed evidence was lawful, it cannot prove that the disputed evidence had that legal source to the exclusion of all other possible sources.⁶ In a "dissipation of the taint" case, it is similarly impossible to demonstrate the ultimate fact in issue without tracing the illegality from its source through all the channels in which it flowed and in all the forms that it took.

Therefore, the government cannot seek to limit disclosure based upon considerations of relevance, for

⁵ The danger of "trial by affidavit" under such circumstances is also shown by the actual cases set out in *Arnstein v. Porter*, 154 F. 2d (2d Cir. 1946).

⁶ Compare *United States v. Schipani*, *supra*.

relevance is the very matter in issue. Compare *United States v. Coplon*, 185 F.2d at 638-39.

But the government would go farther than restrictions based upon relevance. It counsels that the inner workings of the investigative process are in danger of being disclosed, that the privacy and physical safety of third persons are at stake, and that the national security is imperiled. The issues of "inner workings" and third persons' rights are dealt with in the brief in *Alderman v. United States*, filed the same day as this brief. Petitioner turns to the issue of national security.

B. The National Security

1. The national security ought not to be invoked to deny or defer, although it may be used to restrict, disclosure of "bugging" records.

"National security" is a term often and carelessly used. Perhaps only the term "un-American" is vaguer and more laden with serious implicit consequences for the orderly conduct of political affairs and judicial inquiry. See *Watkins v. United States*, 354 U.S. 178, 202 (1957). We may begin with the observation that the term "national security" ought not to be the talisman of pro tanto suspension of the due process clause and the right to a fair hearing: "The requirement of due process is not a fair-weather or timid assurance." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). And see *Rex v. Bodmin Justices*, [1947] K.B. 321, 325, All Eng. 109 ("justice must not only be done but must manifestly be seen to be done"). If there is a right to have excluded from evidence the fruits of the government's unlawful conduct—and there surely is—then that right should not be whittled away in the name of

procedural expedience or even of terrible dangers to the nation's well being. This is so because the dangers set in train by compromising with the fourth amendment are more terrible yet.⁷ The fourth amendment carries within it no exemptions for spycatchers and subversive-hunters.⁷ The case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), often cited in this Court's reports, involved papers thought libelous and potentially subversive of the public order, and yet the authors of that search were brought to judgment for a trespass. The writs of assistance were thought by the Crown to be justified to maintain the security of British rule and therefore of established government. Yet this Court has not retreated from support of James Otis's denunciation of them. See *Boyd v. United States*, 116 U.S. 616, 625 (1886). Even the "executive warrant" for searches in national security case, tentatively advocated by Mr. Justice White, *Katz v. United States*, 389 U.S. 347, 363 (1967), would run counter to established fourth amendment law. *Frank v. Maryland*, 359 U.S. 360, 363 (1959).⁸ We pass, therefore, to consideration of the sort of hearing which should be held in determining the impact of illegal "national security" sur-

⁷ The government has conceded as much. See Reply Memorandum for the United States, filed herein in March 1968: "Petitioner Ivanov suggests that the government is arguing that where it has used electronic surveillance to catch a spy, the spy should not be allowed to challenge the legality of that surveillance. However, that is not the government's position." P. 1.

⁸ This view of the Court in *Frank* as to the illegality of executive warrants was not doubted by the dissenters there, and remains vital despite the decisions in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). Compare Douglas & Brennan, JJ., concurring in *Katz*, 389 U.S. at 359.

veillance upon the evidence adduced in federal criminal cases.

The Solicitor General has in the past cited a number of cases dealing with the executive prerogative in the fields of national security and foreign relations. But we do not take those cases to be at all relevant. It might be said, though petitioner denies that a court would not at the instance of a civil plaintiff upset an executive determination that the nation's security requires there to be undisclosed illegal electronic surveillance in a narrow class of cases.⁹ Such a conclusion would of course call into question the continued vitality of *Reynolds v. United States*, 345 U.S. 1 (1953) and *Zimmerman v. Poindexter*, 74 F. Supp. 933, 936 (D. Hawaii 1947), but it might in the event be reached. It would not, however, touch the question now before the Court. Here the petitioner is a criminal defendant, not a civil plaintiff, and it is the government which seeks dramatically to change the status quo by putting him into prison for a very long time. Judicial review claimed illegality is in such a case a judicial responsibility. See generally Hart & Wechsler, *The Federal Courts and the Federal System* 312-40 (1953). So long as the executive branch stays out of the courts, its "right to be let alone" is perhaps arguable, but when it comes into court it must be bound by the rules

⁹ Compare *Totten v. United States*, 92 U.S. 105 (1875) (plaintiff could not sue on a contract to commit espionage). A cogent exposition of this problem of state secrets in civil litigation appears in *Ticon Corp. v. Emerson Radio & Phonograph Corp.*, 206 Misc. 727, 134 N.Y.S. 2d 716 (1954). See also *Royal Exchange Assur. v. McGrath*, 13 F.R.D. 150 (S.D.N.Y. 1962).

fashioned by the judiciary and the Congress for the protection of litigants' rights.¹⁰

This is the fundamental principle grasped in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), and *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944), and adopted in this Court's opinions in *Jencks v. United States*, 353 U.S. 697, 670-72 (1957) and *Dennis v. United States*, 384 U.S. 855, 873 n. 20 (1966). If the government wants to keep secret its closet full of wrongdoing, then it must stay out of the criminal courts. This does not mean that its secrets must be broadcast to the world. Federal Rule of Criminal Procedure 16(e) provides a means by which those with a right to see may be placed under protective orders regarding disclosure of that which is placed in their hands. Such a procedure was used in the trial of this case as to certain Strategic Air Command materials allegedly taken from the car in which Ivanov was riding. See "Order Permitting Defendant Ivanov to Inspect," entered April 21, 1964, reprinted in the Appendix to Appellant's Brief in the Court of Appeals, Vol. I, p. 19a. The government may argue that protective orders are inadequate, but the difficulties it perceives are based upon the assumption that district judges cannot enforce compliance with orders to which they attach the greatest importance and which are principally addressed to members of the bar. Moreover, if the government is unwilling to permit disclosure to the extent required for a full-dress adversary

¹⁰ A cogent exposition of this problem of state secrets in civil litigation appears in *Ticon Corp. v. Emerson Radio & Phonograph Corp.*, 206 Misc. 727, 134 N.Y.S.2d 716 (1954). See also *Royal Exchange Assur. v. McGrath*, 13 F.R.D. 150 (S.D.N.Y. 1962).

See *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

hearing, upon whom should the consequences of that choice be visited? Petitioners respectfully suggest that our law provides but one answer: the government. See *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D.La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950). Cf. *Reynolds v. United States*, 345 U.S. 1 (1953), and compare the unanimous opinion of the Third Circuit in the case, 192 F.2d 987 (3d Cir. 1951), subscribed to by Justices Black, Frankfurter and Jackson, 345 U.S. 12.

2. If "national security" is to justify denial or deferral of disclosure, the denial or deferral must be attended with procedural safeguards.

The bare claim of privilege by the government will never conclude its opponent. The English rule is apparently to permit such a claim decisive force, Wigmore, *Evidence* § 2379, at 808-810 (McNaughton rev. 1961), but in the United States the rule is otherwise. *Ibid.* Unsettled is the manner in which the claim of privilege is to be considered and ruled upon by the trial court. In, e.g., *Reynolds v. United States*, 345 U.S. 1 (1953), the Court addressed the question in a civil case. It held that in passing upon a claim of governmental privilege, the trial judge must be ruled by the same considerations which guide him in passing upon a claim of the privilege against self-incrimination. In such a case, the judge may not inquire so far into the basis of the claim that he defeats its object by forcing disclosure of the very thing which the privilege is designed to protect.¹¹ *Reynolds* held that so far as the allegedly secret Air Force reports there involved were concerned, the government would not be required to

¹¹ 345 U.S. at 9, citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

disclose—even to the trial judge *in camera*—so much that the secret would be let out.

However, the rule of *Reynolds* must not be taken to have strict application here. *Reynolds* was a civil plaintiff; petitioner is a criminal defendant. See *Reynolds v. United States*, 192 F.2d 987. The analogy to the fifth amendment is not in this case quite so persuasive, for the fifth amendment privilege must be broadly construed in order to effect its great object. That object—a prohibition on testimonial compulsion—lies at the root of the adversary system. The cases since *Reynolds* have shown just how far the privilege extends. *E.g.*, *Emspak v. United States*, 349 U.S. 190, 197-201 (1955), 198-200 (1955). In this case, the privilege at stake, far from upholding the values of fair adversary procedure, tends to defeat them and must therefore be strictly construed. See generally *Dennis v. United States*, 384 U.S. 855, 875 (1966); *Campbell v. Eastland*, 307 F.2d 478, 486 (5th Cir. 1962) (dictum). As a factual matter, it should also be noted that we are here dealing with a mass of integrated material, in which the secrecy claim may be made as to individual words, phrases, sentences and names, and in such a circumstance denial to the trial judge of the opportunity to conduct a full inspection is really impracticable. See the excerpt from the Black transcript, Brief for Petitioners, *Alderman v. United States*, pp. 13-16.

The procedure properly to be followed in ruling on claims of privilege is a modified adversary procedure, as set out in the first *Campbell* case, *Campbell v. United States*, 365 U.S. 85, 92-99 (1961), including when necessary the taking of extrinsic testimony. In this process, “[r]eliance upon the testimony of the witness based

upon his inspection of the controverted document must be improper in almost any circumstances." This is because "[t]he very question being determined . . . [is] whether the defense should have the document. . . ." 365 U.S. at 97. *Campbell* counsels that in ruling upon claims of producibility the trial judge and counsel for both sides must participate to ensure that the ruling is based upon the fullest possible knowledge of the relevant circumstances. From the prosecution side will come witnesses attesting to the importance of restricting disclosure and testifying as to the circumstances which lend credence to a view that nondisclosure will not subvert the adversary inquiry on "taint," and that the government ought not be put to the "disclose or dismiss" option. From the defense will come argument, based upon documents turned over without claim of privilege or turned over after a claim has been overruled, as to the possible importance of the material in the determination of taint *vel non*. In this process, the overriding factor will be the government's obligation to make its proof that it has decontaminated its evidence. And when a party with the burden of proof sticks at rendering up evidence necessary to the disposition of his claim, judgment must go against him to the extent of his refusal or failure to produce.

This suggested procedure can be the matter of only the most general discussion. Its details will remain to be worked out in case after case in the district courts, subject always to this Court's power to review what is done. But if petitioner's primary claim on the scope of the hearing is not accepted, it is submitted that this procedure is the maximum feasible compromise with basic fourth, fifth and sixth amendment principles.

II. EVERY DEFENDANT IN A CRIMINAL CASE SHOULD BE ENTITLED TO CHALLENGE THE ADMISSION OF ANY EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH, FIFTH, OR SIXTH AMENDMENTS.

The issues of a co-defendant's or co-conspirator's standing are discussed in the brief in *Alderman v. United States*, No. 133, October Term 1967, and that filed on behalf of petitioner Butenko. The following discussion is limited to the question raised in the headnote.

"Standing" is a term which gives lawyers, scholars and courts considerable difficulty. See generally *Flast v. Cohen*, 392 U.S. 83, 20 L.ed.2d 947 (1968). Perhaps the confusion has been encouraged, if not engendered, by careless use of the term to refer to several quite distinct limitations upon the power and the willingness of federal courts to entertain claims of violation of federal rights. Search and seizure is not the only field in which it is important to identify the concept of standing under discussion, render it susceptible to analysis and evaluation, and exclude from the analysis the confusing intrusion of different concepts of standing. The varying and sometimes recondite uses of "standing" in the cases make this inquiry doubly difficult. For this case, "standing" must be analyzed in terms of the "person aggrieved" limitation of F.R. Crim.P. 41(e), the nature of fourth amendment rights, and the purposes of the exclusionary rule. This analysis leads ineluctably to the conclusion stated in the headnote to this section of the brief.

To begin, what meanings of standing may we exclude from discussion here? First, "standing" is sometimes used to refer to the procedural capacity of a litigant to sue or be sued. See *Ehrenzweige*, *Conflict of Laws* §§ 11-24.

Second, "standing" is sometimes used to denote a limit upon the judicial power, and to refer generally to the requirement that litigants have a genuine and not a sham contrariety of interests, both qualitatively and quantitatively. Cases in which the requisite "qualitative" adversity was lacking include *Muskrat v. United States*, 219 U.S. 346 (1911), and *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). The question is double-edged in these cases: Will the Court decline on the basis of judicially-fashioned rules of restraint to take the case (see *Muskrat*); and, on the other hand, may Congress bestow standing upon a class of litigants without falling afoul of the proscription on advisory opinions—stated affirmatively as the case or controversy requirement (see *Sanders Bros. Radio Station*). The "quantitative" dimension of standing was here last Term in *Flast v. Cohen*, 392 U.S. 83, 20 L.ed.2d 947 (1968), in which the Court limited *Frothingham v. Mellon*, 262 U.S. 447 (1923). *Frothingham* had rejected a taxpayers' suit directed at a federal statute upon the ground that the interest of a taxpayer in the outcome of the litigation was but a comminute share of the interest of the community at large, and not sufficiently direct and immediate. See also *Doremus v. Board of Education*, 342 U.S. 429 (1952).

A third use of the term "standing" has been in reference to questions essentially of ripeness. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), is such a case. There the FCC had adopted a rule stating that licenses for television broadcasting would not be granted if the applicant had a direct or indirect interest in more than five other stations. *Storer*, which had reached the limit under the rule, sued for a declaration that the rule was invalid. This Court concluded

that Storer had "standing" to sue, resting its decision upon a perception of the statutory judicial review standard and a finding of present harm to Storer. 351 U.S. at 197-99. The Court recognized that "standing," in the sense it had used the term, carried along with it the notion of ripeness. Taking the question before the court out of "standing" language, one could cast it as, "Should Storer have gone through the licence-application process before coming to court?"¹²

A fourth "standing" issue is that of "legal wrong," a term which appeared in § 10 of the old Administrative Procedure Act and which now appears in the judicial review provisions of recodified Title 5, 5 U.S.C. § 702. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-99 (1956); *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939). The "standing" issue in "legal wrong" cases really goes to the merits of the claim being asserted, for standing is denied or upheld based upon whether the harm complained of is legally cognizable.

A fifth definition has been essayed, and is relevant here: Closely related to the fourth meaning but distinct from it, is the issue of "standing" raised when *B* seeks to complain of a violation of rights which are said to "belong" to *A*. Mr. Justice Frankfurter termed this the problem of "directness." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 153-54 (1951). It must be kept in mind, in interpreting "person aggrieved" within the meaning of F.R. Crim.P. 41(e) (or the related language of 5 U.S.C. § 702 or even

¹² This requirement may also be termed one of "finality." See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-156 (1951) (opinion of Frankfurter, J.).

the concept of access to the courts, considered in the abstract), that all of the foregoing five definitions of "standing" may operate to limit judicial review of illegal searches and seizures, though obviously in different ways. For example, if this Court should decide that a criminal defendant may challenge the admission into evidence against him of *any and all* material seized in violation of the fourth amendment, it might limit the rule to post-indictment motions under Rule 41(e), and retain the traditional concept of standing for pre-indictment Rule 41(e) motions. The ground for such a distinction might rest upon principles of "standing" in the sense of "ripeness": a potential defendant, not yet indicted, might be held to be not close enough to being harmed by illegality which did not violate "his" right of privacy. The Court might not, that is, wish to decide the fourth amendment question until it had to. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 155 (1951) (opinion of Frankfurter, J.).

In this case, however, the question of "standing" is of the fifth variety enumerated above, and the fourth amendment decisions of this Court have insisted that a defendant may complain only of violations of "his" fourth amendment rights, which are said to be "personal." See *Agnello v. United States*, 269 U.S. 20 (1925); *Jones v. United States*, 362 U.S. 257 (1960). The reasons for this rule are partly historical. See Brief for Petitioner John William Butenko, No. 197. Perhaps the reasons lie also in a feeling that to extend "standing" as here advocated would let too many criminals go free in consequence of constables' blunders, and that the remedy for illegal searches should be sought in the jurisprudence of Solomon rather than

that of Draco. Cf. Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 379, 389 (1964). But the analogy to Solomon and Draco may teach another lesson, for it should be recalled that Solomon's solution to the problem of the disputed baby would not have satisfied the interest of either litigant. And there are cogent arguments that the doctrine of standing both angers law enforcement agencies (because of the application of the exclusionary rule) and encourages violations of the Constitution which, through artifice, turn up evidence held to be admissible, thus neither satisfying the interest it purportedly serves nor placating the interest it purportedly accommodates. Kamisar, *Illegal Searches and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. Ill. L. For. 78, 105; see also *People v. Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955). In any case, there appears to be no reason inherent in the language or purpose of the fourth amendment for a restrictive view of "person aggrieved" under Rule 41(e). And looking to this Court's constitutional decisions in other fields, upholding *B*'s standing to invoke *A*'s right, one is brought quickly to the conclusion that in the field of search and seizure, *B* must be permitted to challenge a search of *A*'s premises. The closest case is *Barrows v. Jackson*, 346 U.S. 249 (1953). In *Shelley v. Kraemer*, 334 U.S. 1 (1953), this Court had held that a state court could not lend its hand in enforcing racial restrictive covenants in equity against Negro purchasers of real property. The Supreme Courts of Missouri and Oklahoma had taken the view that *Shelley* did not reach a suit in damages against a white seller for breach of such a covenant. *Weiss v. Leason*, 359

Mo. 1054, 225 S.W. 2d 127; *Conell v. Earley*, 205 Okla. 366, 237 P.2d 1017. A principal question was that of the white seller-defendant's "standing" to complain of the equal protection violation.¹³ Clearly she had standing in each of the four senses of the term first listed above. Both parties had procedural capacity, there was qualitative and quantitative (\$11,600 in damages was claimed) contrariety, the claim was ripe for adjudication, and the "legal wrong" complained of lay within the Court's appellate jurisdiction. The standing issue was of the fifth type enumerated above, and the Court's discussion of it is highly relevant, for in *Barrows* the claim was raised—and rejected—that fourteenth amendment rights, being "personal," could not be raised indirectly or vicariously:

"Consistency in the application of the rules of practice in this Court does not require us in this unique set of circumstances to put the State in such an equivocal position simply because the person against whom the injury is directed is not before the Court to speak for himself. The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that re-

¹³ This question would presumably no longer arise in quite the same form, although one could argue whether a white person would be "aggrieved" by a covenant in derogation of the Reconstruction statute construed in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 20 L. ed. 2d 1189 (1968).

spondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, so universally condemned by the courts.

"Petitioners argue that the right to equal protection of the laws is a 'personal' right, guaranteed to the individual rather than to groups or classes. . . . This description of the right as 'personal,' when considered in the context in which it has been used, obviously has no bearing on the question of standing. Nor do we violate this principle by protecting the rights of persons not identified in this record. . . ." 346 U.S. at 259.

The Court's conclusion in *Barrows* would no doubt command today almost universal acquiescence; it called forth at the time only one dissent from a voting member of the Court. And *Barrows* rests, as the quoted excerpt shows, largely upon the quite practical realization that if Mrs. Jackson could not assert the constitutional claim, the way would be open to subvert the teaching of *Shelley*.

Here, it may be urged, continued adherence to the ritual rules of standing leaves open the way to undermine *Katz v. United States*, 389 U.S. 347 (1967), *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Weeks v. United States*, 232 U.S. 383 (1914). Law enforcement officials, well aware of the limits upon standing, have conspired to keep the principal victims of illegality out of court, see Comment, 34 U. Chi. L. Rev. 342 (1967), and thereby to garner advantage from unlawful conduct.

Tort remedies are theoretically possible in such a case, see *Lankford v. Gelston*, 364 F.2d 197 (4th Cir.

1966), although generally ineffective, see *Mapp*, 367 U.S. at 651-53, and in any event the tort remedy if generally pursued promises to cause far more disruption of the law enforcement process and call for far more disclosure of the "inner workings" of the investigative process than has yet been contemplated by any of the parties here or in *Alderman*. See *Elson v. Bowen*, 436 P.2d 12 (Nev. Sup. Ct. 1967). The inaccessability of the Courts to the victims of a constitutional violation has been a potent element in this Court's recognition that others than the nominal victims of illegality have standing to protest. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *NAACP v. Alabama*, 357 U.S. 449 (1958). And certainly when the petitioner wishing to assert the right has suffered or may suffer a criminal conviction, his claim must be given particular weight. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).¹⁴

The confusion which has attended discussions of standing is surely understandable, for the writings of jurists and scholars—not to mention advocates—have not often been models of analytical clarity. It may be suggested that the standing restriction cases, by focusing upon the concept of fourth amendment rights as "personal," make a fatal error. All rights under a system of limited government may be denominated

¹⁴ Other "vicarious assertion" cases are collected and analyzed in Sedler, *Standing to Assert Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962), and in the opinions of Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 223, 149 (1951). See also the opinion of Mr. Justice Jackson, which while it does not extensively discuss legal theory, characteristically takes a workmanlike and practical approach to the issues. 341 U.S. at 186-87. Compare the opinions of Mr. Justice Black, 341 U.S. at 142, and Mr. Justice Douglas, 341 U.S. at 174.

"personal" in one sense or another, but such an assertion does not advance—and may retard—analysis. The real question is whether he who wishes to assert the violation of a right is sufficiently affected by the violation that the court may take cognizance of his claim.¹⁵ If the *B* who wishes to assert an intrusion into *A*'s house is a civil plaintiff, he had a difficult time in showing how he is hurt. Of course, if upon entering *A*'s house, the officers took a package belonging to *B*, the harm to him would be clear. See *Bumper v. North Carolina*, 391 U.S. 543, 20 L.ed.2d 797, 802 n. 11 (1968). But considerations applicable to civil plaintiffs, invoking the limited federal question jurisdiction of Article III courts, are hardly appropriate when considering the claims of criminal defendants, who stand to suffer a clear and present harm as a result of police illegality.

In sum, the issue of "standing" before the court in search and seizure cases, usually asked as "May *B* assert *A*'s right?," should be viewed in the context of this Court's consideration of "vicarious standing"

¹⁵ The rationale for the "personal right" fourth amendment decisions has been stated to be the relationship between the fourth and fifth amendments, a principle discussed in the Brief for Petitioner John William Butenko, No. 197. The self-incrimination rationale has some continued vitality in the field of private papers perhaps, but generally speaking it has been supplanted. Its last major exegesis, in *Frank v. Maryland*, 359 U.S. 360 (1959) was seriously undercut in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). See also *Linkletter v. Walker*, 381 U.S. 618 (1965); Comment, 34 U. Chi. L. Rev. 342 (1967). Even in the field of self-incrimination, this Court has taken steps to limit the use of extra-judicial admissions by *A* against *B*. See *Bruton v. United States*, 391 U.S. 123 (1968), and it may be doubted that the fruits of a confession extracted involuntarily from *A* should be usable in a separate trial of *B*.

in other fields. On this view, the following principles emerge with indisputable clarity:

1. The issue in a criminal case is not whether *B* may assert *A*'s right. *B* is the present victim of police illegality if unconstitutionally-seized evidence is sought to be used against him, and he is made so by the government's choice to proceed against him by making use of its ill-gotten gains. He is as much a victim as the civil defendant in *Barrows v. Jackson, supra*.¹⁶

2. The "standing" rule encourages police illegality and ensures that wrongs of the character here in issue will continue to go unrevealed and uncorrected. In cases of electronic surveillance, where the fourth amendment violation is deliberate and clear, and where its fruits are spread through dozens of files, the standing rule has proven to be the cloak for illegality beyond measure. See the testimony concerning so-called "intelligence investigations" set out in Brief for Petitioner, *Alderman v. United States*, No. 133, October Term 1967, p. 8. n. 8.

To preserve the fourth amendment, therefore, the "standing" requirement must be stripped of the ritualistic impedimenta which have hampered the development of truly effective weapons against lawless law enforcement, confused and confounded the fourth amendment's central meaning, and derogated from its great promise to "the people" generally of freedom from unlawful search.

¹⁶ Compare Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev., #4 (Summer 1968), forthcoming, especially nn. 98-99 and accompanying text.

III. WHAT KIND OF REMAND?

The Solicitor General has not said whether the illegal surveillance picked up any conversations of counsel. See *Hoffa v. United States*, 387 U.S. 231 (1967). Whether or not such conversations were overheard, however, petitioner submits that a new trial should be ordered. Such an order would comport with the basic federal policy in favor of pretrial hearings on motions to suppress, *Battle v. United States*, 345 F.2d 438 (D.C. Cir. 1965); Comment, 54 Calif. L. Rev. 1070 (1966), a policy defeated in this case by the government's failure to make disclosure.

CONCLUSION

For the foregoing reasons, petitioner prays that his conviction be set aside, that the cause be remanded, and that if the government wishes to retry petitioner a full and fair hearing be held on the issue of illegal electronic surveillance.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 197

JOHN WILLIAM BUTENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF ON BEHALF OF PETITIONER,
JOHN WILLIAM BUTENKO**

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Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 384 F.2d 554, and is printed in the Appendix to the Petition for Certiorari.

Jurisdiction

Petitioner was convicted of conspiracy to transmit to the Soviet Union information relative to the national defense of the United States. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1). On June 17, 1968, this Court granted certiorari limited to certain questions.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Questions Presented

This Court's grant of certiorari was limited to the following questions:

"On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?" *Butenko v. United States*, 396 U.S. —, 88 S. Ct. 2293-94 (1968).

Statement of the Case

Petitioner, John William Butenko, along with codefendant, Igor H. Ivanov, were convicted in the United States District Court of New Jersey on an indictment charging the codefendants of conspiring together and with Gleb A. Pavlov, Yuri Romashin and Vladimir I. Olenov, unindicted co-conspirators (enjoying diplomatic immunity from prosecution) to transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. §794(a) and (c) (count I). The defendants were also convicted for conspiring to cause petitioner to act as an agent of the Soviet Union without prior notification to the Secretary of State in violation of 18 U.S.C. §951 (count II). In addition, petitioner was convicted of a substantive violation of 18 U.S.C. §951 (count III). Butenko received concurrent sentences of 30 years, 10 years and 5 years imprisonment on the three counts on which he was convicted; Ivanov received concurrent sentences of 20 years imprisonment on count I and 5 years on count II. The Court of Appeals for the Third Circuit affirmed the conviction of Butenko on all counts, affirmed the conviction of Ivanov on count I, but set aside his conviction on count II. *United States v. Butenko*, 384 F.2d 554 (3d Cir. 1967). Subsequently, petitioner sought and was granted certiorari by this Court, the grant of certiorari being limited to the afore-said questions presented.

Petitioner's position is that the records of illegal electronic surveillance involving petitioner or a codefendant including unindicted co-conspirators should not be subjected to an *ex parte*,¹ *in camera* inspection by the trial judge to

¹ The term "*ex parte*" is used throughout this brief to describe an inspection of the records of illegal electronic surveillance by

determine the necessity of compelling the Government to make disclosure of such records to petitioner, nor should the turn-over of such records be controlled by the doctrine of standing. Rather, petitioner's position is that all the records of the illegal electronic surveillance involving petitioner, a codefendant and the unindicted co-conspirators, including the logs of monitored conversations, summaries of the logs, and all memoranda derived from the logs and summaries should be turned over directly to petitioner. After petitioner and his counsel have thoroughly examined the records, there should be a full adversary hearing to determine whether any of the Government's evidence introduced at petitioner's trial was derived directly or indirectly from illegal electronic surveillance.

The Solicitor General's position is that the records of any electronic surveillance including that of a defendant's conversations or of a defendant's premises should initially be produced *in camera* for examination by the trial judge, presumably *ex parte*. Then, after reviewing the records, the trial judge would turn over to petitioner only those records which the judge found to have some "relation" or "relevance" to petitioner's prosecution, or would order any further proceedings which he deems appropriate. See Memorandum for the United States on the Motion to Amend, *Kolod v. United States*, No. 133, October Term, 1967.

the trial judge alone, without the safeguards of an adversary proceeding as would be assured by the presence of defense counsel. See Point I, *infra*.

Summary of Argument

The records of electronic surveillance should not be subjected to an *ex parte*, *in camera* inspection by the trial judge. Such procedure is contrary to present standards which have been established by this Court to assure the fair administration of criminal justice. Due to the extent and complexity of the Government's program of illegal electronic surveillance, it is improbable that even the most experienced and conscientious trial judge will be able to determine *in camera* and *ex parte* whether any of the Government's evidence is tainted with illegality. Only defense counsel, equipped with all the records of electronic surveillance at a full adversary hearing, can adequately perform the function of purging the Government's case of illegally-gathered evidence.

In addition, an *ex parte*, *in camera* proceeding violates petitioner's right to a public trial, his right to cross-examine and confront the witnesses against him, and his right to the assistance of counsel, as guaranteed by the Sixth Amendment. These guaranties apply to suppression hearings to determine whether the Government's evidence is tainted with illegal electronic surveillance.

The presence in this case of a national security issue does not lead to a contrary result. When the Government chooses to prosecute an individual, it cannot invoke a claim of privilege to deprive the accused of anything which might be material for his defense. However, the Government, upon a sufficient showing at a closed adversary hearing that national security is at stake, may obtain from the court a protective order that there be a private but fully adversary

hearing to determine whether the prosecution's case is tainted with illegal evidence.

Prior to the adversary hearing, defense counsel must be equipped with all the Government's records of electronic surveillance which form part of the Government's investigative file on petitioner. Although there may be a danger of injury to innocent third persons by such full disclosure, the rights of these persons may be adequately protected through use of protective orders, the contempt power, and private hearings. Contrary, there is no way of protecting petitioner other than by full disclosure of all the records. Thus, on balance, petitioner's right to protect himself from illegal governmental conduct outweighs the possible invasion of privacy of third persons.

Petitioner has standing to object to the direct or indirect use against him of all of the above records of electronic surveillance whether or not the surveillance took place at his premises, at the premises of indicted or unindicted co-conspirators, or at the premises of innocent third persons, and whether or not he was a party to the overheard conversations. Under traditional theory: (1) petitioner has standing to object to surveillance at his premises regardless of whether he was present on the premises or a party to the overheard conversations; (2) petitioner has standing to object to surveillance at anyone's premises if petitioner was present on the premises or a party to the overheard conversations; (3) moreover, several decisions of this Court and other courts support the position that petitioner would have standing to object to information obtained by surveillance at the premises of a codefendant or unindicted co-conspirator even though petitioner was not present on the searched premises or a party to overheard conversations.

However, to afford petitioner standing in this last situation, or as to third persons, the Court may have to modify or abolish the traditional doctrine of the personal nature of Fourth Amendment rights. In order to fully effectuate the purposes of the exclusionary rule—the deterrence of illegal police conduct and the imperative of judicial integrity—the Court must give petitioner standing to object to the use against him of any illegally-gathered evidence, regardless of its source. Otherwise the Court would give government officials an incentive to invade the rights of privacy of third persons in order to use the evidence thereby obtained against an accused. Moreover, a ruling which permits the admission against petitioner of evidence seized in flagrant violation of a third person's Fourth Amendment rights has the necessary effect of condoning the illegal conduct which produced the evidence, and puts a premium on lawlessness at a time when "law and order" is the cry of the day.

ARGUMENT

I.

The Proposed Hearing Procedure Is Contrary to Present Standards Which Have Been Established by This Court to Assure the Fair Administration of Criminal Justice.

The Government's position is contrary to established notions concerning the fair administration of criminal justice announced by this Court in *Jencks v. United States*, 353 U.S. 657 (1957) and most recently reiterated in *Dennis v. United States*, 384 U.S. 855 (1966).

Jencks held that the defense in a federal criminal prosecution was entitled to obtain for impeachment purposes statements which had been made to government agents by government witnesses touching the events and activities as to which they testified at trial. The court further held that

"... the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." 353 U.S. at 668-69.

The Court expressly disapproved of *ex parte, in camera* inspection by the trial judge for his determination of relevancy and materiality:

"The practice of producing government documents to the trial judge for his determination of relevancy

and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. . . .” 353 U.S. at 669.

Shortly after the *Jencks* decision, Congress enacted the so-called “Jencks” Act, 18 U.S.C. §3500, to govern the production of statements made to government agents by government witnesses. “One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the indiscriminating production of agent’s summaries of interviews regardless of their character or completeness.” *Palermo v. United States*, 360 U.S. 343, 350 (1959).² Thus in *Palermo*, on the basis of the Jencks Act, the Court denied production to the defense of a 600-word memorandum summarizing parts of a 3½-hour interrogation of the witness by a government agent on the basis that such memorandum was not a “statement” which was required to be produced

² “Not only was it strongly feared that disclosure of memoranda containing the investigative agent’s interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness’ own rather than the product of the investigator’s selections, interpretations and interpolations.” *Palermo v. United States*, 360 U.S. 343, 350 (1959).

under the definition of "statement" contained in 18 U.S.C. §3500(e).

However,

"... Congress took particular pains to make it clear that the legislation 'reaffirms' ... [the *Jencks*] holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial. S. Rep. No. 981, 85th Cong. 1st Sess., p. 3. And see H.R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3, 4." *Palermo v. United States*, 360 U.S. 343, 361 (1959) (concurring opinion).

The Court's disapproval in *Jencks* of *ex parte*, *in camera* proceedings to determine relevancy of statements for impeachment purposes was not altered by this Court's statement in *Palermo*: "[W]hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination." 360 U.S. at 354. Rather, the Court was concerned with maintaining the statutory purpose of the *Jencks* Act of limiting production to the defense of "statements" as defined by 18 U.S.C. §3500(e):

"The Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." 360 U.S. at 354.

Once the trial judge determines that the document is a "statement" within the purview of 18 U.S.C. §3500(e), "whether the statement may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States*, 367 U.S. 203, 258 (1961).

Be that as it may, the fact remains that the Jencks Act as construed and applied in *Palermo* and *Scales* reflects a retreat from the position of full disclosure to the defense required by the *Jencks* decision. The retreat was deemed necessary because required by a Congressional enactment involving no constitutional barrier, *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959), raised by the *Jencks* decision which was "not put on constitutional grounds." *Palermo v. United States*, *supra*, at 362 (concurring opinion); accord, *Scales v. United States*, 367 U.S. 203, 257-258 (1961). In the absence of a statute expressly requiring *in camera* inspection, this Court in other situations adheres to the *Jencks* case policy of full disclosure to the defense while leaving questions of the admissibility in evidence of the disclosed material to the Court.

The Court's disapproval of *ex parte*, *in camera* proceedings was again asserted in *Dennis v. United States*, 384 U.S. 855 (1966), where the Court addressed itself to the disclosure to the defense of a witness' grand jury testimony, for the purpose of impeachment.

Dennis noted that the trend toward more expansive disclosure to the defense of a witness' grand jury testimony for the purpose of impeachment is

"entirely consonant with the growing realization that disclosure, rather than suppression, of relevant ma-

materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act. 18 U.S.C. §3500 (1964 ed.), responding to this Court's decision in *Jencks v. United States*, 353 U.S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice." 384 U.S. at 870-71.

Furthermore, the Court noted that in a conspiracy case, with its inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants,

"it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." 384 U.S. at 873.

The Court commented upon the practice of some of the Courts of Appeals of permitting an *ex parte*, *in camera* inspection by the trial judge of grand jury minutes of the testimony of a witness called by the prosecution at trial:

"While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove of it for that purpose—it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining some-

times voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburg Plate Glass*, 360 U. S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this regard is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. Cf. Fed. Rule Crim. Proc. 16(e), as amended in 1966; 18 U.S.C. §3500 (c)." 384 U.S. at 874-875.

Accord, *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967); *United States v. Coplon*, 185 F.2d 629, 636-640 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); *United States v. Baker*, 262 F. Supp. 657, 665 n.5 (D.D.C. 1966), motion to dismiss indictment and suppress evidence denied, 266 F. Supp. 456 (D.D.C.), motion for new trial

denied, 266 F. Supp. 461 (D.D.C. 1967), appeal pending, No. 21154 (D.C. Cir.).

The reasons for permitting defense counsel rather than the trial judge to inspect all records of illegal electronic surveillance, including the logs of monitored conversations, summaries of the logs, and all memoranda derived from the logs and summaries are more compelling than in regard to the grand jury testimony in *Dennis* or the FBI reports in *Jencks*. If "it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness," *Dennis v. United States*, 384 U.S. 855, 874 (1966), it is even more difficult for a trial judge to evaluate a mass of electronically-obtained data together with leads and other information thereby obtained in an effort to determine whether the prosecution's evidence is tainted with illegal electronic surveillance. At least when inspecting grand jury minutes or witnesses' statements, the judge can look at the material of one witness at a time while the witness' testimony is still fresh in his mind, while records of electronic surveillance afford no such confinement or freshness of memory.

Because of the extent and complexity of the government's illegal electronic surveillance programs "it will be extremely difficult for even the most able and experienced trial judge" to determine *in camera* and *ex parte* whether any of the Government's evidence is tainted with illegality. The extent and complexity of the Government's activity has been fully analyzed in the Brief for Petitioners on Motion to Modify, *Kolod v. United States*, No. 133, October Term, 1967, pp. 7-12. As indicated therein:

1. "[T]he government apparently assumes that all *leads* from conversations picked up over an electronic device are clearly identifiable as such and will concern the same subject matter as the conversation itself. This is manifestly not the case. . . . The change in character and subject matter of the investigative leads and the mixing of information from many sources is most likely to take place in the type of investigations conducted by the FBI with the aid of electronic devices. Many such investigations were 'intelligence type investigations' where no particular violation of federal law was being pursued. Moreover, one of the FBI procedures in such an investigation is to build dossiers on the names of associates of the investigative target. Thus the mere mention of a name over the device may lead to a dossier on that person and his relationship to the target on subject matters unrelated to the conversation heard over the device. If these new matters are relevant to a later prosecution, analysis of the microphone logs will never reveal it."

2. "Further complicating the issue of any *in camera* inspection by the trial judge is the simple difficulty in identifying the illegally seized material and leads therefrom once they have been commingled with other information in the investigative files without the assistance of live witnesses."

3. "A further issue which no judge could decide *in camera* is the relationship of the illegally seized material and leads therefrom to the decision-making process as it affects the progress of the criminal investigation."

4. "Finally, the Internal Revenue Service method of electronic surveillance is even less susceptible to *in camera* judicial resolution" as illustrated in *McGarry v. United States*, No. 1184, October Term, 1967, Supreme Court of the United States, which is now pending before this Court on petition for writ of certiorari.

Moreover, in accord with the pronouncement in *Dennis*, it is not realistic to assume that the trial judge's *in camera* inspection of the records of electronic surveillance, however conscientiously made, would exhaust all the possible avenues of inquiry which defense counsel would pursue if he were equipped with the surveillance record. In our adversary system, weight should be given to the ingenuity of defense counsel since the determination of what may be useful to the defense can properly and effectively be made only by an advocate. *Dennis v. United States*, 384 U.S. 855, 875 (1966); see *United States v. Coplon*, 185 F.2d 629, 636-40 (2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U.S. 920 (1952) (cited with approval on this very point, *Dennis v. United States*, 384 U.S. 855, 875 n.22 (1966)); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 148-49 (1964). It is no disparagement to say that usually the judge does not know enough about the case at the time he must determine whether the illegal surveillance led directly or indirectly to any of the prosecution's evidence. See *id.* at 148. Before trial, he is less knowledgeable than the parties, particularly in criminal proceedings presenting complicated issues. *United States v. Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967). In order to inform himself adequately, the judge would have to postpone really important sup-

pression issues until trial, contrary to the spirit and intention of Rule 41(e) of the Federal Rules of Criminal Procedure. Otherwise, the Judge's decision would be no more than a mere guess. For an illustration of the judge's inability to know how the case will develop at trial, see the recent case of *United States v. Baker*, 262 F. Supp. 657 (D.D.C. 1966), appeal pending No. 21154 (D.C. Cir.), as analyzed in Brief for Petitioners on Motion to Modify, *Kolod v. United States*, No. 133, October Term, 1967, pp. 18-19.

In short, the trial judge simply ought not to be burdened with the task or the responsibility of examining sometimes voluminous records of electronic surveillance in order to ascertain whether the illegal surveillance led to any of the prosecution's evidence. See *Dennis v. United States*, 384 U.S. 855, 874 (1966). It is to be doubted that the trial judge can afford the time and effort involved to examine numerous logs of monitored conversations, involving in some instances hundreds of hours of transcription, as well as the summaries of these logs and memoranda derived from the logs and summaries. After examination of this mass of information, it would then be necessary to examine each piece of evidence to be introduced, each witness to be called, and perhaps even the questions to be put to these witnesses, to determine the nature of their derivation. The time and effort thus involved would make the approach suggested by the Solicitor General impractical. Pitler, *Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser: A Comment*, 34 Brooklyn L. Rev. 223, 244-45 (1968); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 148 (1964).

But above and beyond the burden an *in camera* inspection imposes upon a judge, the procedure must lead to serious error and failure of due process. As was said by Mr. Justice Jackson in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-225 (1953) (dissenting opinion): "Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration."

Petitioner does not know whether it was a distrust of *ex parte* proceedings that impelled Congress not to adopt *ex parte* procedure in Title III (Wiretapping and Electronic Surveillance) of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 (June 19, 1968), reported in *United States Code Congressional and Administrative News*, 90th Cong. 2d Sess., pp. 1511-28 (1968) [hereinafter cited as Crime Control Act]. §2518 (10)(a) of the Act provides that in any suppression hearing "The Judge . . . may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." Of significance is the fact that Congress did not use the term *in camera*, a term expressly used in the Jencks Act. The omission of this term from the 1968 Act indicates that Congress has rejected the *in camera* standard of the Jencks Act and supports the contention that an adversary proceeding is required. The congressional policy evinced by the 1968 Act on the subject of electronic surveillance should further condemn the government's quest for *ex parte*, *in camera* proceedings on this subject.

Another basis for rejecting an *ex parte*, *in camera* procedure is found in the nature of the right asserted by petitioner as compared with the right protected in *Jencks* and *Dennis*. *Jencks* and *Dennis* involve relatively simple trial problems relating to the credibility of witnesses. The liberal turn-over of material to the defense for utilization at trial in those situations is based on the principle that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870 (1966). Much more is involved in the case at bar: Petitioner seeks to vindicate a constitutional right which has been violated. To deny petitioner open access to material to enable him to vindicate his constitutional right demotes a Fourth Amendment right below that afforded to an accused who merely seeks evidence in the hands of the prosecution for impeachment purposes. This demotion not only makes the Fourth Amendment mere words, but also deprives petitioner of his Sixth Amendment rights.

II.

The Proposed Hearing Is in Violation of Petitioner's Sixth Amendment Rights.

The Solicitor General's proposed hearing procedure violates petitioner's right to a public trial, his right to cross-examine and confront the witnesses against him, and his right to the assistance of counsel, as guaranteed by the Sixth Amendment. These Sixth Amendment guaranties apply to suppression hearings to determine whether any of the prosecution's evidence is tainted with illegal electronic surveillance. See *DiBella v. United States*, 369 U.S.

121, 131 (1962) (a suppression hearing is part of a criminal trial); *United States v. Coplon*, 185 F.2d 629, 636-40 (1950), cert. denied, 342 U.S. 920 (1952). But see Note, *The Coplon Case: Wiretapping, State Secrets, and National Security*, 60 Yale L.J. 736, 738 n.16 (1951). In *Coplon*, *supra*, the Second Circuit Court of Appeals, speaking through Judge Learned Hand, stated that the trial judge's failure to disclose to the defense all of the records of illegal wiretapping was a violation of their Sixth Amendment rights. 185 F. 2d 637-38. Accord, *People v. Cartier*, 51 Cal. 2d 590, 599-600, 335 P.2d 114, 120-21 (1959).

Indeed, in *Coplon*, *supra*, the court stated that *ex parte*, *in camera* proceedings would violate the defendant's Sixth Amendment rights *even assuming that the wiretaps were irrelevant to the prosecution's case*:

"[S]ince we have not seen them [the wiretap records] and do not mean to look at them, we will assume that they justified the judge's finding that they did not 'lead' to any evidence introduced. However, the refusal to allow the defence to see them was, as we have said, a denial of their constitutional right In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead,' or might have 'led,' to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor." 185 F.2d at 638.

Petitioner contends that he should have the right to inspect all the records of illegal electronic surveillance.

Coplon, supra; Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 646 (1968). In addition, petitioner should have the right at a public trial to examine the agents who supervised the illegal activity and the men who overheard the monitored conversations in order to determine the use, dissemination and exploitation of the illegal evidence. See *People v. Morhouse*, 21 N.Y.2d 66, 77, 233 N.E.2d 705, 710-11, 286 N.Y.S.2d 657, 665-66 (1967) (where a full evidentiary hearing was directed on remand). It is only in this manner that petitioner can be assured that the prosecution's case is completely scoured of the taint of illegality.

The public proceeding will provide checks upon the veracity of the government's agents as well as assuring that the government has conscientiously turned over to the defense all of the records of illegal surveillance. See *In re Oliver*, 333 U.S. 257, 270 n.25 (1948), citing 1 Cooley, Constitutional Limitations (8th ed. 1927) at 647:

"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions"

See also 6 Wigmore, Evidence § 1834 (3d ed. 1940).

Through cross-examination of the government's agents who supervised the electronic surveillance, and the people who overheard the monitored conversations, petitioner will be better equipped to ascertain the use to which the illegal activity was put. See *Nardone v. United States*, 308 U.S. 338 (1939). No *ex parte*, *in camera* proceeding can even

come close to doing this. The government's case against the petitioner did not consist of tapes of conversations, or summaries of those conversations. But, conceivably and quite likely the illegal records were exploited in such a way as to lead the government to evidence which was used against the petitioner. See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Staples v. United States*, 320 F.2d 817, 820 (5th Cir. 1963). It is not realistic to assume that a trial judge, no matter how conscientious, would exhaust all possible avenues of inquiry as to the use, dissemination and exploitation of the illegal evidence. Cf. *Dennis v. United States*, 384 U.S. 855, 874-75 (1966). Rather, it is only counsel for the defense who has the motive of showing that the government agent's statements are inaccurate or incomplete. Moreover, since the government has the burden of purging its case, *United States v. Wade*, 388 U.S. 218, 240 (1967); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952), it is difficult to see how the untested and hearsay observations of agents, contained in documents turned over under government supervision, can be said to satisfy that burden.

Related to the right of cross-examination is the right to assistance of counsel. This right includes consultation and understanding of the accused's case before trial, a consideration of his special interest in cross-examination of witnesses, production of defensive evidence, making of argument, and otherwise. *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965). *Ex parte, in camera* proceedings effectively deny petitioner of that right by not providing his counsel with the opportunity of inspecting all of the records and inquiring into their use, dissemination and exploitation. See *United States v. Dennis*, 384 U.S. 855, 875

(1966); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (once it is established that wiretapping was unlawfully employed, "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree."); *United States v. Coplon*, 185 F.2d 629, 637-39 (1950), cert. denied, 342 U.S. 920 (1952) (refusal to allow defense to see all the wiretaps was a denial of their Sixth Amendment rights).

The suggestion that the hearings to determine whether the petitioner's constitutional rights under the Fourth Amendment were violated be held *in camera* not only violates Sixth Amendment rights of petitioner but is also unprecedented. In *In re Oliver*, 333 U.S. 257, 266 (1948) the Court said: "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country."

III.

Ex Parte, in Camera Proceedings Should Not Be Authorized Merely Because This Case May Involve Considerations of National Security.

The Solicitor General has argued that the presence in this case of a national security issue is an additional consideration for requiring an *ex parte, in camera* proceeding. According to the Solicitor General, disclosure of the "inner workings of the investigative process" may "injure the national interest." Memorandum in Response to Motion to Amend the Petition for Certiorari, *Butenko v. United States* and *Ivanov v. United States*, No. 1007 Misc. and No. 885, October Term, 1967, p. 2.

It would appear that, at this late stage, there is little reason for the Solicitor General's concern with the "inner workings of the investigative process" insofar as the FBI's eavesdropping program is concerned. For example, there have been several statements by former FBI agents to various news media detailing the agency's eavesdropping techniques; also, in *United States v. Baker*, 262 F. Supp. 657 (D.D.C. 1966), FBI agents testified extensively of their eavesdropping tactics. *Elson v. Bowen*, 436 P.2d 12, 15 (Nev. Sup. Ct. 1967). In addition, other illuminating disclosures have been made by FBI agents as illustrated in Brief for Petitioners on Motion to Modify, *Kolod v. United States*, No. 133, October Term, 1967, pp. 8-10.

Lencks v. United States, 353 U.S. 657 (1957), effectively disposes of the Government's insistence on an *ex parte*, *in camera* proceeding if national security is involved:

"It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. This has been recognized in decisions of this Court in civil causes where the Court has considered the statutory authority conferred upon the departments of Government to adopt regulations 'not inconsistent with law, for . . . use . . . of the records, papers . . . appertaining' to his department. The Attorney General has adopted regulations pursuant to this authority declaring all Justice Department records confidential and that no disclosure, including disclosure in response to subpoena, may be made without his permission.

"But this Court has noticed, in *United States v. Reynolds*, 345 U.S. 1, the holdings of the Court of Appeals for the Second Circuit [*United States v. Beek-*

man, 155 F.2d 580 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944)] that in criminal causes ' . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . . ' 345 U.S., at 12.

"In *United States v. Andolschek*, 142 F.2d 503, 506, Judge Learned Hand said:

' . . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same

reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. . . .

"We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Rovario v. United States*, 353 U.S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." 353 U.S. at 670-72.

Accord, *United States v. Coplon*, 185 F.2d 629, 636-40 (2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U.S. 920 (1952) (cited with approval in *Dennis v. United States*, 384 U.S. 855, 873 n.20 (1966)). See Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875, 903-05 (1966). See also *United States v. Egorov*, and *United States v. Sokolov* (E.D.N.Y. Oct. 2, 1964), in N.Y. Times, Oct. 3, 1964, p. 1, col. 3; and Oct. 4, 1964, p. 1, col. 5, where, upon the Government's motion, the espionage case against the Sokolovs was dismissed "in the interests of national security." As reported in the N.Y. Times, *supra*, the impression prevailed that in trying to prove the Sokolovs guilty, the United States might disclose investigative and counterespionage techniques. Cf. *Abel v. United States*, 362 U.S. 217, 219-20 (1960) (the nature of the case—the fact that it was a

prosecution for espionage—has no bearing whatever upon the legal considerations relevant to the admissibility of evidence); *United States v. Powell*, 156 F. Supp. 526 (N.D. Cal. 1957), motion for leave to file petition for writ of mandamus or prohibition denied, 260 F.2d 159 (9th Cir. 1958), mistrial granted, 171 F. Supp. 202 (N.D. Cal. 1959). See generally, Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. Pa. L. Rev. 166 (1958); Orfield, *Privileges in Federal Criminal Evidence*, 40 U. Det. L.J. 403, 426-31 (1963).

In *Coplon*, *supra*, the court held that the defendant was entitled to examine unlawfully taken tape-recordings of various telephone conversations although the trial judge had read the records *in camera* and had determined that these recordings had not led the Government to evidence introduced at trial. Judge Learned Hand considered whether the presence in the case of "state secrets"—the divulgence of which would imperil "national security"—would be a sufficient justification for the trial judge's refusal to let defense counsel see the wiretap records which he had read *in camera*. He found that the presence of such "state secrets" was not a sufficient excuse to toll the defendant's constitutional rights under the Sixth Amendment. 185 F.2d at 637-38. Reaffirming his decision in *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944), he stated:

"In *United States v. Andolschek* we held that, when the Government chose to prosecute an individual for crime, it was not free to deny him the right to meet the case made against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the dis-

closure of such 'state secrets' as might be relevant to the defence. To that we adhere." 185 F.2d at 638.

United States v. Coplon, supra, and its citation with approval in *Dennis v. United States*, 384 U.S. 855, 873 n.20 also effectively disposes of any reliance by the Solicitor General upon the Jencks Act case of *Palermo v. United States*, 360 U.S. 343 (1959), and the provisions of Rule 16 of the Federal Rules of Criminal Procedure.

It is to be noted that the material protected under the Jencks Act or by Fed. R. Crim. P. 16(e) from the abuses of discovery (see Advisory Committee's Note, Fed. R. Crim. P. 16(e), 39 F.R.D. 175, 178 (1966)) is material lawfully obtained by the Government. Neither the Jencks Act or 16(e) reach the question here where the material was illegally obtained by electronic surveillance. The claim of the government to the privacy of its files is the strongest possible when such files contain no illegally obtained material. Yet in *Jencks*, the government was compelled to submit to the defense the statements of the witness testifying at the trial despite the claim of state secrets or other confidential information.

If the policy of protecting state secrets from disclosure cannot survive the needs of the defense at trial to obtain merely impeachment material as in *Jencks* when no Fourth Amendment right was at stake, then certainly the need of the defense in the instant case to vindicate a constitutional right is even more compelling to override a claim of privilege because a state secret or confidential information is involved. The same may be said as to any contention that discovery will be abused contrary to the purpose of Fed. R. Crim. P. 16(e). Petitioner does not seek to abuse dis-

covery. He only seeks to vindicate a constitutional right. In any event the government is not prevented from protecting state secrets or confidential information; it has the option, as *Jencks* points out, of dismissing the prosecution.

At this point we may well ask, what is a "state secret" or "national security?" There is "no distinction under the Fourth Amendment between types of crimes. Article III, §3, gives 'treason' a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Mr. Justice Douglas' concurring opinion). How, then, is the meaning of these terms to be determined? Certainly not by the government's *ipse dixit* or by a proceeding *in camera*. Cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 228 n.9 (1953) (dissenting opinion).

Moreover, the claim that investigative files containing lawfully-gathered information should be kept free of disclosure

"could be more sympathetically received if experience showed that the government consistently and carefully separated illegally-gathered material from that legally gathered, to permit easy identification of the source of any given communication or item of intelligence. The evidence demonstrates that, on the contrary, the government mixes up lawful and unlawful in its files, thus by its own conduct reinforcing the need for the kind of inquiry petitioners submit the constitution demands." Brief for Petitioners on Motion to Modify, *Kolod v. United States*, No. 133, October Term, 1967, p. 17.

See *United States v. Goldstein*, 120 F.2d 485, 488 (2d Cir. 1941) (L. Hand, J.), *aff'd*, 316 U.S. 114 (1942):

"[A] wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unraveling the skein which the guilty party has snarled."

Petitioner concedes, however, that there may be instances in which *public* disclosure of records of illegal surveillance would be so inimical to national security that the trial judge should hold a modified *in camera* proceeding in the presence of the opposing parties, their counsel, and necessary expert witnesses.³ See Carrow, *Governmental Non-disclosure in Judicial Proceedings*, 107 U. Pa. L. Rev. 166, 195 (1958); Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 Harv. L. Rev. 468, 482-86 (1948); Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875, 886-87 (1966); Note, *Exclusion of the General Public from a Criminal Trial—Some Problem Areas*, 1966 Wash. U.L.Q. 458, 471 n.66; Note, *The Coplon*

³ In *Sobell v. United States*, 264 F. Supp. 579 (S.D.N.Y.), *aff'd*, 378 F.2d 674 (2d Cir. 1967), *cert. denied*, 389 U.S. 1051, petition for rehearing denied, 390 U.S. 977 (1968), petitioner moved pursuant to 28 U.S.C. §2255 to vacate and set aside a judgment of conviction entered against him in 1951. During the course of the proceedings, the Government, in the interest of national security, submitted an order under which the entire §2255 proceedings would be held *in camera* save those portions the Government might choose to make public. However,

"when directed to present evidence to prove that the national security would be imperiled by public disclosure, the government, having known all along that its position had no basis in fact and that the AEC had stated the material [relating to the atomic bomb] had been declassified since 1951 and could be publicly disclosed, thereupon abandoned the secrecy melodrama and withdrew its application for *in camera* proceedings" Petitioner's Brief for Certiorari, *Sobell v. United States*, No. 791, October Term, 1967, p. 9.

Case: Wiretapping, State Secrets, and National Security, 60 Yale L.J. 736, 742-43 (1951).

Thus, whenever it becomes evident that the Government has engaged in illegal electronic surveillance: (1) the accused and defense counsel would be entitled to inspect all such records of illegal electronic surveillance; (2) during a public adversary hearing, defense counsel would be permitted to cross-examine government agents as to the use, dissemination and exploitation of the records; (3) despite the general rules (1) and (2) above, the Government upon a sufficient showing at a closed adversary hearing that public disclosure of particular information would jeopardize national security, may obtain from the court a protective order that there be a closed hearing to determine whether the prosecution's case is tainted with illegal evidence. Cf. *Dennis v. United States*, 384 U.S. 855, 875 (1966); but see *United States v. Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967). At such closed hearing, the adverse parties, their counsel, and expert witnesses would be present. However, if the Government refuses to disclose the records of illegal electronic surveillance at such a hearing, the Court should, as in *Jencks*, dismiss the indictment. See *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. (1949)), aff'd by an equally divided Court, 339 U.S. 940 (1950); Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. Pa. L. Rev. 166, 195 (1958).

IV.

The Rights of Innocent Third Persons.

In Parts V and VI of this brief, petitioner contends that he should have access to *all* the Government's records of illegal electronic surveillance which form part of the Government's investigative file on him. Thus, petitioner recognizes that inherent in this position is a danger of injury to innocent third persons, and an enlargement of the original breach of their right of privacy. Such a turn-over has been characterized as a compounding of the Government's breach of privacy of third persons. See *United States v. Baker*, 262 F. Supp. 657, 666-67 (D.D.C. 1966).

Nevertheless, the further invasion of the rights of third persons is no justification for *ex parte*, *in camera* inspection of the records of illegal electronic surveillance. Indeed, it seems paradoxical that the Government after invading the rights of these very persons now asserts itself as protector of their interests. To allow the Government to assert the rights of third persons in an attempt to prevent disclosure would permit it to hide behind its own illegal conduct and favor a suitor with unclean hands. *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (dissenting opinion).

Beyond these admonitions, however, is the delicate balance that must be undertaken between the constitutional right of the accused to purge the prosecution's case of illegal evidence, *Wong Sun v. United States*, 371 U.S. 471 (1963); *Weeks v. United States*, 232 U.S. 383 (1914), and the government's vicarious claim of the right of third persons to be free from disclosure in a judicial proceeding of material

obtained by the government's invasion of their privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). In unrelated but perhaps analogous situations the Court has struck the balance in favor of protecting the accused's rights to properly present his case. See *Dennis v. United States*, 384 U.S. 855 (1966) (secrecy of grand jury minutes); *Jencks v. United States*, 353 U.S. 657 (1957) (secrecy of FBI reports), *Rovario v. United States*, 353 U.S. 53 (1957) (informer's privilege). Of course, unlike the above cases where the parties knew they were involved, this case relates to the rights of innocent third persons who in no way imagined that they were a part of the Government's surveillance.

As has been analyzed previously in this brief, *ex parte*, *in camera* inspection by the trial judge will afford no or only *de minimis* protection to the petitioner. Thus, other than by full disclosure of all the records of illegal surveillance, petitioner is deprived of any opportunity to purge the Government's case of illegality. Conversely, although full disclosure of all of the Government's records may further invade the privacy of third persons, it is not at all certain that it would cause injury to them or their reputations; moreover, the courts through the use of protective orders and the contempt power have an available means for adequately protecting the rights of third persons. In comparison then, it would seem that the petitioner's right to protect himself from the government's illegal conduct outweighs the possible invasion of privacy of third persons.

When it is recognized that disclosure of these records has already been made to countless government agents, Memorandum in Opposition to Motion to Modify, *Kolod v. United States*, No. 133, October Term, 1967, p. 3, the slight additional disclosure to petitioner does not seem unreason-

able. This appears especially so when compared with the strong policy of affording the defendant every opportunity to vindicate a constitutional right.

If the risk of injury to such persons or to their reputations is serious, then on an adequate showing of this fact, a modified *in camera* hearing as in the case of serious threat to national security, would be appropriate. See pp. 31-32 *supra*.

Interwoven with the problems posed by the intervention of the injury to persons or reputations is the difficult problem of determining when petitioner has standing to object to the use against him of any or all information obtained from illegal surveillance. See *United States v. Baker*, 262 F. Supp. 657, 663-67 (D.D.C. 1966). The rest of the brief is devoted to an analysis of this issue.

V.

Standing to Object.

A. INTRODUCTION

It would be difficult to invent a more restrictive concept to the vindication of Constitutional rights or leading to greater contrariety of opinion or difficulty of exposition than the doctrine of standing. *Flast v. Cohen*, 390 U.S. —, 88 S. Ct. 1942 (1968); *Berger v. New York*, 388 U.S. 41, 101 (1967) (dissenting opinion); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Jones v. United States*, 362 U.S. 257 (1960); *United States ex rel. De Forte v. Mancusi*, 379 F.2d 897, 899 (2d Cir. 1967), *aff'd*, 390 U.S. —, 88 S. Ct. 2120 (1968). See, *e.g.*, Edwards, *Standing to Suppress*

Unreasonably Seized Evidence, 47 Nw. U.L. Rev. 471 (1952); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342 (1967) [hereinafter cited as Comment, 34 U. Chi. L. Rev. 342 (1967)].

Since *Weeks v. United States*, 232 U.S. 383 (1914), this Court has followed the precept that, in order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, defendants in federal prosecutions have the right to have excluded from trial evidence which had been obtained by means of an unlawful search and seizure. But it was not until almost fifty years later that this Court held that the Fourth Amendment right to privacy was guaranteed against state invasion by the Fourteenth Amendment, and had to be enforced by the same exclusionary rule applied in the federal courts. *Mapp v. Ohio*, 367 U.S. 643 (1961).

And to make more complex the doctrine of standing, this Court has also held that the rights protected by the Fourth Amendment are personal rights which may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. See, e.g., *Jones v. United States*, 362 U.S. 257 (1960).⁴ Thus,

⁴ The issue presented to the Court was whether Jones was a "person aggrieved" within the meaning of Rule 41(e) of the Federal Rules of Criminal Procedure, and accordingly had standing to make a motion to suppress pursuant to that Rule:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' *Hatch v. Reardon*,

"although evidence obtained by an unconstitutional search and seizure may not be used at trial against the 'victim' of the search, other persons who do not have 'standing' to object to the search can be convicted on the basis of the same evidence." 34 U. Chi. L. Rev. 342 (1967). See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Graham*, 391 F.2d 439 (6th Cir. 1968); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966). Cf. *Goldstein v. United States*, 316 U.S. 114 (1942).

In the pre-*Mapp* era, the federal rule was that a defendant who wished to assert a Fourth Amendment right was required to "claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones v. United States*, 362 U.S. 257, 261 (1960); see, e.g., *Simmons v. United States*, 390 U.S. 377, 389-90 (1968); Edwards, *supra*. Strict adherence to such a rule could create injustice. In part to avoid the particular dilemma in *Jones*, this Court in that case relaxed the above standing requirements in two alternative ways: (1) when as in *Jones*, possession of the seized evidence both convicts and confers standing, there is no necessity for a preliminary showing of an interest in the

204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

"Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." 362 U.S. at 261.

premises searched or the property seized; (2) alternatively, the defendant need not have a possessory interest in the searched premises in order to have standing; suffice, that he be legitimately on the premises where the search occurs.⁵

In cases subsequent to *Jones*, this Court has further relaxed standing requirements in order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures.

Although in *Berger v. New York*, 388 U.S. 41 (1967) the petitioner was found clearly to have "standing to challenge the statute being undisputably affected by it," Mr. Justice Harlan in his dissent at pp. 101-04 analyzed the threshold issue of standing in the following way. *Berger's* conversations were overheard by an electronic device in the office of Harry Steinman, apparently as part of the investigation of Steinman. The installation of the device was under the authority of New York's permissive eavesdrop statute, N.Y. Code Crim. Proc. §813-a;⁶ this order was issued on

⁵ Some relaxation of the stringent standard seemed to be in the making even prior to *Jones*. *United States ex rel. De Forte v. Mancusi*, 379 F.2d 897 (2d Cir. 1967), *aff'd*, 390 U.S. —, 88 S. Ct. 2120 (1968). In *McDonald v. United States*, 335 U.S. 451 (1948), the Court held that where the trial court wrongfully denied a defendant's motion to suppress, the denial was error that was prejudicial to a codefendant as well, even assuming that the codefendant's right of privacy was not invaded. See the recent case of *Roberts v. United States*, 389 U.S. 18 (1967). But see *Wong Sun v. United States*, 371 U.S. 471 (1963). And in *United States v. Jeffers*, 342 U.S. 48 (1951), the Court held that a defendant who had stored narcotics in a hotel room rented by his two aunts, and to which he had been given the key, had standing to object to an unlawful search and seizure in the aunt's room.

⁶ The Court held that the language of §813-a was too broad in its sweep, permitting a trespassory invasion of the home or office, by general warrant, contrary to the Fourth and Fourteenth Amendments.

the basis of affidavits which "indicated that evidence had been obtained 'over a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer,' that conferences 'relative to the payment of unlawful fees' occurred in Steinman's office." 388 U.S. at 96. Thus the Steinman order was issued principally upon the basis of evidence obtained under the authority of the Neyer order. A threshold question, therefore, was whether Berger had standing to contest the Neyer order to determine whether it was issued upon probable cause.

It appeared that Berger was never present in Neyer's office during the period in which eavesdropping was conducted; nor did Berger have a proprietary interest in the premises. The only invasion of Berger's privacy was that in the course of the surveillance of Neyer's office, Neyer had several telephone calls with Berger. To Mr. Justice Harlan, this slight invasion of Berger's privacy was sufficient to confer standing upon him:

"The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded. . . . [T]he recording of a portion of a telephone conversation to which petitioner was party would suffice to give him standing to challenge the validity under the Constitution of the 'Neyer order.' 388 U.S. at 103-04..

Further erosion of the doctrine of standing is found in *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120 (1968) where union records were seized from an office shared by De Forte and several other union officials. At the time of the seizure De Forte was present in the office, and pro-

tested the seizure. The papers which were seized, however, belonged not to De Forte but to the Union. Nevertheless, the Court held that De Forte had standing to object to the admission of the papers at his trial. The case appears to be a significant relaxation of traditional standing requirements; heretofore the Court has held that a defendant has no standing to object to the use of papers and documents against him at his trial on the ground that those records, belonging to someone else, had been taken from the owner in violation of the owner's Fourth Amendment rights; rather objection to use of such papers as evidence has been left to the owner whose own constitutional rights were invaded. 88 S. Ct. at 2126-28 (dissenting opinion). It is clear, however that the Court did not overrule the requirement of standing; rather the Court justified its decision on a liberal interpretation of *Jones; supra*, and *Katz v. United States*, 389 U.S. 347 (1967). As stated by the Court in *Mancusi*:

"Moreover, this is not a case in which it is necessary to decide whether the traditional doctrine that Fourth Amendment rights 'are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure' . . . should be modified." 88 S. Ct. at 2122-23.⁷

The question remains, however, whether there is any life or vitality left to the doctrine of standing. In *Simmons v. United States*, 390 U.S. 377, 390 n.12 (1968), it was noted

⁷ For other recent cases discussing the issue of standing, see *Bumper v. North Carolina*, 390 U.S. —, 88 S. Ct. 1788 (1968); *Simmons v. United States*, 390 U.S. 377 (1968); cf. *Roberts v. United States*, 389 U.S. 18 (1967).

that it has been suggested that the adoption of a "police-deterrent" rationale for the exclusionary rule logically dictates the abolition of the doctrine of standing. The Court, however, did not consider this position because that argument was not advanced in *Simmons*. Petitioner advances that argument in this case but before doing so will analyze his rights on the basis of the doctrine of standing as though it were still viable and will hereinafter contend that the doctrine of standing is an anomaly and an anachronism which if not already interred, should be now.

B. PETITIONER HAS STANDING TO OBJECT TO ILLEGAL SURVEILLANCE CONDUCTED AT HIS PREMISES.⁸

If illegal surveillance took place at the premises of petitioner while he was present on the premises, there is no question that petitioner would have standing to object to the use against him of that evidence. *Jones v. United States*, 362 U.S. 257 (1960). Truly in this situation, petitioner would be the "one against whom the search was directed." *Id.* at 261. See *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120, 2123 n.4 (1968); *Bumper v. North Carolina*, 390 U.S. —, 88 S. Ct. 1788, 1791 n.11 (1968); *Fullbright v. United States*, 392 F.2d 432 (10th Cir. 1968).

Likewise, if petitioner was absent from his premises while illegal surveillance was being conducted there, and was also not a party to the overheard conversation, he would also have standing to object to the use against him of the evidence thereby obtained. *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120, 2123 n.4 (1968); *Bumper v. North*

⁸ This contention is apparently conceded by the Solicitor General. See Memorandum for the United States on Motion to Amend, *Kolod v. United States*, No. 133, October Term, 1967, pp. 5-6.

Carolina, 390 U.S. —, 88 S. Ct. 1788, 1791 n.11 (1968); *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Jeffers*, 342 U.S. 48 (1951); *Henzel v. United States*, 296 F.2d 650 (5th Cir. 1961); *United States v. Baker*, 262 F. Supp. 657, 665-66 (D.D.C. 1966). *Jones, supra*, states the traditional view that a substantial possessory interest in the premises searched is, by itself, sufficient to confer standing. 362 U.S. at 261, 263.* “His possessory interest derives *where* the search is made, not *when*.” *Dean v. Fogliani*, 407 P.2d 580, 582 (Nev. Sup. Ct. 1965). Indeed, whether or not the petitioner happens to be present at his premises during the illegal surveillance, he is still the “one against whom the search was directed.” *Bumper v. North Carolina*, 390 U.S. —, 88 S. Ct. 1788, 1791 n.11 (1968); *Henzel v. United States*, 296 F.2d 650, 653 (5th Cir. 1961). Moreover, one has the reasonable expectation that his premises will be secure against governmental intrusion regardless of whether he is present in the premises at the particular time that the surveillance is conducted. See *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120, 2123-24 (1968); *Katz v. United States*, 389 U.S. 347 (1967). The “reasonable expectation” test for determining whether there has been an invasion of privacy used by this Court in *Mancusi v. De Forte, supra*, has been incorporated in the Crime Control Act §2510(2) by defining “oral communication” to mean “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”

* In *Jones*, standing was held to exist on two distinct grounds, one of which was a sufficient possessory interest in the premises searched. *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120, 2123 n.5 (1968).

But even under the orthodox standards, this expectation, to be let alone, is defeated by illegal electronic surveillance of petitioner's premises, whether or not he was present on the premises or party to the overheard conversation. Hence, if petitioner has a possessory interest in the premises searched, it is not necessary that he be a party to the overheard conversations, or otherwise have a possessory interest in the property seized. In *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120 (1958), De Forte did not even have a possessory interest in the premises although he was legitimately on the premises where the search occurred. The property seized, however, belonged not to De Forte but to the Union. Nevertheless, he was held to have standing. See, e.g., *Giacona v. United States*, 257 F.2d 450 (5th Cir.), cert. denied, 358 U.S. 873 (1958); *United States v. Baker*, 262 F. Supp. 657, 665-66 (D.D.C. 1966); Annot., 78 A.L.R. 246, 253 (1961).

C. PETITIONER HAS STANDING TO OBJECT TO ILLEGAL SURVEILLANCE CONDUCTED AT THE PREMISES OF HIS CODEFENDANT (OR AT THE PREMISES OF THE UNINDICTED CO-CONSPIRATORS).

If illegal surveillance took place at the premises of petitioner's codefendant or the unindicted co-conspirators while petitioner was present on their premises, it seems clear that petitioner would have standing to object to the use against him of any or all information obtained by the surveillance. *Jones v. United States*, 362 U.S. 257 (1960). At the time of the search, Jones was present on the searched premises with the permission of the owner. The Court held that "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.* at 267.

Similarly, in *United States v. Hagarty*, 388 F.2d 713 (7th Cir. 1968), electronic surveillance was conducted as part of the investigation of one Nasser at his office. During part of the surveillance, Hagarty was present in Nasser's office at Nasser's invitation; during that time, recordings of their conversations were made. The court held that Hagarty had standing to object to the recordings even though they were made as part of the investigation of Nasser and took place in his office. The court relied principally on this Court's decision in *Berger v. New York*, 388 U.S. 41 (1967). There Berger's conversation was overheard by an electronic device in the office of Steinman, apparently as part of the investigation of Steinman. The Court stated: "... petitioner clearly has standing to challenge the statute [permitting judicially approved eavesdropping], being indisputably affected by it" *Id.* at 55. See *Katz v. United States*, 389 U.S. 347 (1967) (capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded premises, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion); *United States v. Jeffers*, 342 U.S. 48 (1951); *United States v. Baker*, 262 F. Supp. 657 (1966).

Likewise, if recordings were made at the codefendant's or an unindicted co-conspirator's premises of conversations to which petitioner was not a party, even though he was present on the codefendant's or the unindicted co-conspirator's premises at the time of the surveillance, he would still have standing to object to the recordings made. *Berger v. New York*, 388 U.S. 41, 103 (1967) (dissenting opinion) (without significance if Berger had been present for a conference in Neyer's office, but had said

nothing). See *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120 (1968) (unnecessary to have an interest in the property seized).

Where the petitioner is not present on the premises of the codefendant or an unindicted co-conspirator while illegal surveillance is being conducted there, but the petitioner's conversation is recorded (for example, by overhearing a telephone conversation) petitioner would also have standing to challenge the admissibility of the evidence obtained thereby. *Berger v. New York*, 388 U.S. 41, 101-04 (1967) (dissenting opinion). Such a result would not be contrary to the traditional doctrine that Fourth Amendment rights "are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389 (1968). In *Berger*, Mr. Justice Harlan stated:

"It is surely without significance in these circumstances that petitioner did not conduct the conversation from a position physically within the room in which the device was placed; the fortuitousness of his location can matter no more than if he had been present for a conference in Neyer's office, but had not spoken, or had been seated beyond the limits of the device's hearing. The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded. Standing should not, in any event, be made an insuperable barrier which necessarily deprives of an adequate remedy those whose rights have been abridged; to impose distinctions of excessive refinement upon the doctrine

'would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.' *Jones v. United States, supra*, at 267. It would instead 'permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right.' *United States v. Jeffers*, 342 U.S. 48, 52. I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which petitioner was party would suffice to give him standing to challenge the validity under the Constitution of the Neyer order." 388 U.S. at 103-04 (dissenting opinion).

See *United States v. Hagarty*, 388 F.2d 713 (7th Cir. 1968); *United States v. Baker*, 262 F. Supp. 657, 663-66 (D.D.C. 1966) (defendant given all recordings of conversations in which he was a participant).¹⁰

Where the petitioner is neither present at the premises of the codefendant or the unindicted co-conspirators nor a party to overheard conversations, it is submitted that he should also have standing to object to information obtained by the surveillance at such premises. At first blush, it appears that to sustain this position, the Court would have to modify the traditional notion that Fourth Amendment rights "are personal rights" that "may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed." *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2120, 2122-23 (1968). However, certain opinions of this Court and other courts offer the Court a basis

¹⁰ The contention here urged is apparently conceded by the Solicitor General. See Memorandum for the United States on Motion to Amend, *Kolod v. United States*, No. 133, October Term, 1967, pp. 5-6.

for sustaining petitioner's contention without modification of traditional doctrine.

McDonald v. United States, 335 U.S. 451 (1948) supports the position that if any defendant is entitled to suppression, erroneous denial of a motion on his behalf is prejudicial to his codefendants. In *McDonald*, police officers entered McDonald's rooming house without a warrant and found him and a guest, Washington, in possession of numbers, slips, piles of money, and adding machines. This evidence was used to convict McDonald and Washington of running a lottery. After holding that denial of McDonald's motion to suppress was erroneous, the Court, in an opinion by Mr. Justice Douglas, and joined in by three other Justices stated:

"[T]he unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that *the denial of McDonald's motion was error that was prejudicial to Washington as well.* . . . If the property had been returned to McDonald, it would not have been available for use at the trial." 335 U.S. at 456. (Emphasis added.)¹¹

¹¹ In a concurring opinion, Mr. Justice Rutledge was of the opinion that with respect to Washington, the evidence, having been illegally obtained was inadmissible. 335 U.S. at 456-57.

"It is not clear from the Court's opinion in *McDonald* why it was *error* to admit the evidence against Washington (there being no doubt that the admission was prejudicial). One an-

McDonald has been accepted for the "principle that the erroneous denial of a pretrial motion to suppress is prejudicial not only to the defendant who made the motion but to his codefendant as well if the illegally seized material is the basis of evidence used against the latter at trial." *United States v. Graham*, 391 F.2d 439, 445 (6th Cir. 1968); *Rosencranz v. United States*, 334 F.2d 738, 739 (1st Cir. 1964). Moreover, as the case has been interpreted, the rights conferred upon those who would otherwise be in no position to object to the introduction of the illegal evidence are derivative or secondary in the sense that they depend upon a timely objection by the party with standing, *United States v. Graham*, 391 F.2d 439, 445 (6th Cir. 1968).¹²

We find in *Hoffa v. United States*, 385 U.S. 293 (1966), reh. denied, 386 U.S. 940 (1967) support for *McDonald*. In that case Partin, an undercover agent had conversations with Hoffa and King but never with Parks and Campbell the other two conspirators; the reports on Hoffa and

swer suggested by the Court in its statement that had the property 'been returned to McDonald, it would not have been available at the trial,' has generally been discounted in subsequent decisions. See *Rosencranz v. United States*, supra, 334 F.2d at 740-741, n.3; *United States v. Granello*, supra, 243 F. Supp. at 327-328." *United States v. Graham*, 391 F.2d 439, 445 (6th Cir. 1968).

¹² Several Circuit Courts of Appeals have followed the ruling in *McDonald*. See, e.g., *Wattenburg v. United States*, 388 F.2d 853, 859 (9th Cir. 1968); *Barnett v. United States*, 384 F.2d 848, 862 (5th Cir. 1967); *Gillespie v. United States*, 368 F.2d 1, 6-7 (8th Cir. 1966); *Rosencranz v. United States*, 334 F.2d 738 (1st Cir. 1964); *Hair v. United States*, 289 F.2d 894, 897 (D.C. Cir. 1961). *Contra*, *United States v. Graham*, 391 F.2d 439 (6th Cir. 1968); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966). It has been suggested that the decision of this Court in *Wong Sun v. United States*, 371 U.S. 471 (1963) overruled *McDonald*. Comment 34 U. Chi. L. Rev. 342, 346 n.26 (1967).

King "uncovered leads that made possible the development of evidence against petitioners Parks and Campbell." 385 U.S. at 300. The government contended that Parks and Campbell had no standing because Partin never communicated with them. Their rights were held to depend on Hoffa who clearly had standing to invoke his constitutional right and that they could not prevail unless Hoffa prevailed. It is clear from *Hoffa* that the sanction for the invasion of a Constitutional right extends to others charged in the same conspiracy as well as to the initial or sole victim of the invasion. It is appropriate that a codefendant should be given at least derivative or representative standing when the charge against him is a conspiracy, as in the instant case, in view of the rule of attribution normally applied in conspiracy cases.

It seems that the holding of *McDonald* and *Hoffa* applies to the present case. As analyzed, *supra*, a codefendant has standing to challenge information illegally obtained during a surveillance of his premises or conversations of a co-conspirator. If he had been erroneously denied a motion to suppress, that denial would have been prejudicial error as to petitioner as well under *McDonald* and *Hoffa*, since during their joint trial, the evidence would have been used against both the codefendant and the petitioner. But where the codefendant does not have an opportunity to object to illegally-gathered evidence until after the conclusion of the joint trial (because of the tardy admission of illegal surveillance activity by the Government), the same result of prejudicial error to petitioner should apply. *Cf. Roberts v. United States*, 389 U.S. 18 (1967). It would be inconsistent with the fair administration of criminal justice to let the rights of petitioner rest upon the fortuitous disclosure by

the Government of its illegal conduct prior to the joint trial. For if petitioner is prejudiced only if his codefendant is erroneously denied a pretrial motion to suppress, there would be an incentive on the part of the Government to withhold disclosure until after trial, in order to circumvent the rule in *McDonald*.¹³

Judge Aldrich's concurring opinion in *Rosencranz v. United States*, 334 F.2d 738, 741-42 (1st Cir. 1964) presents an alternative basis upon which to grant petitioner standing to object to illegal electronic surveillance at the premises of a codefendant or an unindicted co-conspirator.¹⁴ As stated by Judge Aldrich:

"[T]he real basis of the exclusionary rule is its effect as a police deterrent, and that the rule should be fashioned to deter the accomplishment of whatever purpose the police were improperly attempting to further. I believe, accordingly, that the present defendants' rights are not simply dependent upon Amorello's [a codefendant], as Washington's were said to depend upon McDonald, but are broader, and stem from their own status as parties against whom the search was directed. Surely, in stopping Amorello's truck, the

¹³ If the codefendant had successfully moved prior to trial to suppress the evidence that evidence could not be introduced at the joint trial of the codefendant and petitioner, even though there was a clear instruction that the evidence could be considered only as against petitioner. *Gillespie v. United States*, 368 F.2d 1, 6 (8th Cir. 1966); cf. *Bruton v. United States*, 390 U.S. —, 88 S. Ct. 1620 (1968).

¹⁴ In *Rosencranz*, Amorello and his codefendants were indicted for offenses relating to the operation of an illicit still. Before trial Amorello moved to suppress as evidence materials seized from the truck he owned and operated. After his motion was denied he pleaded guilty and the seized evidence was introduced at the trial of Amorello's codefendants over their objections.

interests of the police were not limited to the driver, *but were directed against all those, whether their identities were known or not, who might be engaged in the operation of the still.* I find support for this in *Jones v. United States*, *supra*, where the court said, 362 U.S. at 261, 80 S. Ct. at 731,

'In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.'" *Id.* at 742. (Emphasis added.)

This theory of standing would have an appropriate application in the area of illegal electronic surveillance and finds support in the most recent congressional legislation on the subject. In the Crime Control Act §2510(11), the term "aggrieved person" is defined to mean "a person who was a party to any intercepted wire or oral communication or *a person against whom the interception was directed*" (emphasis added). Under this statutory standard interceptions of a codefendant's or an unindicted co-conspirator's oral communications would constitute petitioner an "aggrieved person" if the surveillance was directed against him. And in view of the fact that the indictment and convictions are based on charges of conspiracy, it is difficult to conceive a surveillance of a codefendant's or an unindicted co-conspirator's premises as not being directed at petitioner. Petitioner also respectfully submits that this Court should apply the aforesaid statutory definition of an "aggrieved person" to him in the instant case as this

Court applied the statutory standards of the Jencks Act in *Palermo*.

The surreptitious and extensive nature of electronic surveillance requires an application of the doctrine of standing co-extensive with the type of illegal activity involved. Even more than in a search for tangible items electronic surveillance is directed not only at the owner of the searched premises, but also at the person's compatriots in crime, whether their identities are known or not. Cf. Pitler, "*The Fruit of the Poisonous Tree*" *Revisited and Shepardized*, 56 Calif. L. Rev. 579, 645 (1968) [hereinafter cited as Pitler]. Many electronic surveillances are "intelligence type investigations" where no particular violation of federal law is being pursued. For example, during the electronic surveillance of Mr. Drew in *United States v. Drew*, Cr. No. 1333, United States District Court for the District of Nevada, FBI agents "were interested in Mr. Drew from the standpoint of his activities, his associates, who he was contacting in connection with organized crime and organized criminal activity;" the "primary objective in the investigation was intelligence information just as it is in an espionage investigation." Brief for Petitioners on Motion to Modify, *Kolod v. United States*, No. 133, October Term, 1967, p. 8. Thus to grant these associates and codefendants standing would be commensurate with the purpose of the exclusionary rule, and in line with the Court's holding in *Jones*, *McDonald*, and *Hoffa*.

Petitioner, however, recognizes the criticisms of *McDonald* and Judge Alrich's opinion.¹⁵ Moreover, the approach

¹⁵ For example, *McDonald* never expressly modified the traditional doctrine that Fourth Amendment rights are personal rights which may be enforced by only the person whose own privacy was invaded. Judge Alrich's opinion presents the difficult problem of

suggested by the two opinions does not suffice to give petitioner the full measure of protection which is necessary to assure that the prosecution's case is not tainted with illegally-gathered evidence. In addition to the records of surveillance at his own or a codefendant's or co-conspirator's premises, petitioner contends that he should have access to *all* the Government's records of illegal electronic surveillance which form part of the Government's investigative file on petitioner and the crime for which he was convicted; this turnover would include all records of surveillance at the premises of innocent third persons not a party to the criminal action. Leads to evidence against petitioner may have been obtained just as readily from such third persons, as from petitioner's codefendant or unindicted co-conspirators. Thus, petitioner will be assured that the prosecution's case is scoured of illegally-gathered evidence only by the full turnover suggested.¹⁶

Petitioner concedes that there is no method of achieving this result other than by modifying or abolishing the traditional doctrine of the personal nature of Fourth Amendment rights. See *Mancusi v. De Forte*, 390 U.S. —, 88 S. Ct. 2122-23 (1968). It is to this necessary modification or abolition that petitioner now turns.

determining in each case whether the government officials directed their surveillance at persons other than the owner of the searched premises. Moreover, Judge Alrich's approach avoids a confrontation with the traditional dogma.

¹⁶ The further breach of the right of privacy of third persons has been discussed in Point IV, *supra*.

VI.

Petitioner Should Have Standing to Object to the Use Against Him of Any Illegally-Gathered Evidence, Regardless of Its Source.

"Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry v. Ohio*, 390 U.S. —, 88 S. Ct. 1868, 1875 (1968); see *Weeks v. United States*, 232 U.S. 383, 391-93 (1914). The exclusionary rule is therefore designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). See *Terry v. Ohio*, *supra*; *Linkletter v. Walker*, 381 U.S. 618 (1965). See generally Comment, 34 U. Chi. L. Rev. 342 (1967).

"The rule also serves another vital function—'the imperative of judicial integrity.' *Elkins v. United States*, 364 U.S. 206, 222 . . . (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of

the exclusionary rule withholds the constitutional imprimature." *Terry v. Ohio*, *supra*, 88 S. Ct. at 1875.

See *Mapp v. Ohio*, *supra* at 659; *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

To give proper effect to the exclusionary rule, it seems logical to exclude all illegally obtained information, regardless of its source, unless there are competing considerations which compel a more restricted application of the rule. See Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 379, 389 (1964); Pitler, *supra* at 586-88. One competing consideration, in criminal as well as civil cases, is the judicial policy of admitting relevant and reliable evidence in order to maximize the search for the truth; in criminal prosecutions, the exclusionary rule conflicts with an additional policy—the strong public interest in convicting the guilty. *Id.*¹⁷ These competing policies “create a shield to repel the exclusionary rule’s radiations,” and “may well explain the continued vitality, if not the origin of, the standing requirement” Pitler, *supra* at 587. As discussed by Professors Amsterdam and Pitler, *supra*, the exclusionary rule’s deterrent effect “is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest” Thus, in every prosecution in which exclusion is in issue, the strong public interest in deterring lawless police conduct must be balanced against

¹⁷ Another obvious competing consideration is the rights of innocent third persons. See point IV *supra*.

the public interest in convicting the guilty, and the judicial policy of admitting trustworthy evidence. Pitler, *supra* at 587.

Decisions of the Courts of Appeals for the Sixth and Second Circuits have struck the balance in favor of the latter policies, stating that the policy of deterrence is sufficiently advanced by excluding the results of illegal searches and seizures at the behest of victims. See *United States v. Graham*, 391 F.2d 439, 445-46 (6th Cir. 1968); *United States v. Bozza*, 365 F.2d 206, 223 (2d Cir. 1966).¹⁸ The above proposition appears to present the crucial issue to which this Court must address itself, namely, are the purposes of the exclusionary rule sufficiently advanced by excluding the results of illegal electronic surveillance at the behest of only the victims of the surveillance?¹⁹ In other

¹⁸ The fact that deterrence is achieved at a high price—the suppression of relevant evidence—has led some commentators to conclude that the exclusionary rule should not be available to defendants who claim no interest in the property searched or seized. See, e.g., Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471, 472 (1952); Comment, *Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure*, 55 Mich. L. Rev. 567, 581 (1957).

¹⁹ *Jones v. United States*, 362 U.S. 257, 261 (1960) states that the exclusionary rule is a “means for making effective the protection of privacy” of the victim of the illegal search. “But it is difficult to see how the exclusionary rule accomplishes this objective. An unreasonable search can never be undone. At the time of exclusion, the victim’s home has already been entered and his secrets have been uncovered. [*Linkletter v. Walker*, 381 U.S. 618, 637 (1965).] The only protection the exclusionary rule can give this type of privacy rests in the possibility that the police will be deterred from making a second search of the victim’s premises.” Comment, 34 U. Chi. L. Rev. 342, 347 (1967). Accord, Pitler, *supra* at 649 n.352. *Jones* can be explained if one recognizes that the exclusionary rule was originally premised on both the Fourth and Fifth Amendments; thus, its protection was thought by most courts and commentators to be limited to the victim of the search. See Broeder, *Wong Sun v. United States: A Study in Faith and*

words, will the admission against defendants of evidence obtained by illegal electronic surveillance at the premises of a codefendant, an unindicted co-conspirator, or a third person not a party to or involved in the criminal action encourage unlawful police conduct in the future?

The illogic of the present standing requirement is that it serves to defeat the purpose for which the exclusionary rule exists, and encourages rather than discourages unlawful police conduct. See Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967). As observed by one commentator:

"Unlike many deterrent mechanisms, the exclusionary rule does not achieve its effect by the infliction of sanctions, but rather by the removal of incentives. The rule encourages police to refrain from unreasonable searches not for fear of punishment, but simply because there is no reason for making them. When the courts [through the imposition of standing requirements] allow some violations of the fourth amendment to reap rewards, the removal of incentives, which is the only basis of the deterrence, is undermined." Comment, 34 U. Chi. L. Rev. 342, 357 (1967).

Hope, 42 Neb. L. Rev. 483, 540 (1963); Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1140-41 (1967) [hereinafter cited as Comment, 115 U. Pa. L. Rev. 1136 (1967)]. Therefore, according to Professor Broeder, the "personal interest" or "aggrieved party" limitation "is based on an historical misunderstanding" of the Fourth Amendment. Broeder, *supra*.

"[T]here is absolutely no reason . . . why a rule designed to protect fourth amendment rights should depend on more than the fourth amendment and/or why the self-incrimination clause of the fifth amendment, which by definition can only be personal, should be employed to water down the scope of the fourth by engrafting upon it a 'personal interest' or 'aggrieved party' limitation." Broeder, *supra*.

Thus, once government officials are certain that only the victim of the search can challenge the admissibility of illegally seized evidence, they will be free, if so inclined, "to invade homes, wiretap phones, and 'bug' bedrooms as long as the information is not used against the owner, or one who is legitimately on the premises or a party to the conversation." Pitler, *supra* at 649. See *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955);²⁰ Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 539 (1963); Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967); 66 Colum. L. Rev. 400, 404 (1966).²¹ Indeed, the rise in the number of lower court opinions in recent years wherein defendants have unsuccessfully sought to suppress evidence illegally seized from third persons may suggest

²⁰ In *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955), the Supreme Court of California refused to follow the federal rule that only those whose own constitutional rights have been violated may object to the introduction against them of illegally obtained evidence. Justice Traynor, speaking for the court, stated that courts "have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers . . . whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence." *Id.* at 759, 290 P.2d at 857. In addition, "if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of evidence illegally obtained against them." *Id.*

²¹ Cf. *People v. Portelli*, 15 N.Y.S.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965), cert. denied, 382 U.S. 1009 (1966) (witness beaten and tortured until he gave information concerning defendant); National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 156 (1931) ("third degree" employed to get information about an offense from persons who are not suspected of committing a crime but only knowing about it).

that the present standing requirements have served to encourage illicit police behavior. See, e.g., *Thomas v. United States*, 394 F.2d 247 (10th Cir. 1968); *United States v. Graham*, 391 F.2d 439 (6th Cir. 1968) (and cases cited *id.* at 444); *United States v. Baker*, 262 F. Supp. 657 (D.D.C. 1966); *People v. Cefaro*, 21 N.Y.2d 252, 234 N.E.2d 423, 287 N.Y.S.2d 371 (1967).²²

Thus it seems that the purpose of the exclusionary rule—to deter illicit police activity—is not sufficiently advanced by excluding the results of illegal electronic surveillance at the behest of only the victims of the surveillance.

Aside from deterrence, however, the exclusionary rule also serves another vital function—the preservation of judicial integrity. *Terry v. Ohio*, 390 U.S. —, 88 S. Ct. 1868, 1875 (1968). “Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.” *Id.* However a ruling which permits the admission against petitioner of evidence seized in flagrant violation

²² In addition to encouraging illicit police conduct, the application of the standing requirement often achieves unjust and undesirable results. This is perhaps best illustrated by the conspiracy cases where the owner of the illegally searched premises, who is often the ringleader, goes free while his underlings are incarcerated. Broeder, *supra* at 541; Comment, 34 U. Chi. L. Rev. 342 (1967); Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967). See cases cited in *United States v. Graham*, 391 F.2d 439, 444 (6th Cir. 1968). “This result can be explained only as a compromise, through which the leader must go free in the interest of deterring unlawful police conduct. At the same time, society continues to prefer to incarcerate the underlings rather than, for the sake of consistency, free all the conspirators without punishment.” Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967).

of a third person's Fourth Amendment rights "has the necessary effect of legitimizing the conduct which produced the evidence." *Id.*; accord, *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). See Broeder, *supra* at 540: "[T]he Court, in allowing a conviction based on a fourth amendment violation to stand, sullies its own distinguished image and casts an ominous, brooding shadow over the administration of criminal justice throughout the land."²³ Thus the preservation of judicial integrity is an additional reason for modifying the traditional doctrine that Fourth Amendment rights are personal rights which may be enforced only at the behest of the victim of the illegality.

The standing requirement; therefore, is at odds with both purposes of the exclusionary rule.²⁴ This rule has been most recently interpreted as a general deterrent—the pro-

²³ "Moreover, the exclusionary rule has an educational function. It is intended to instill in police officers an appreciation of the importance of individual privacy, and in citizens a sense of respect for the integrity of the law enforcement system and, consequently, for the laws of the society. When selective violations of the Constitution are sanctioned by the courts, this mutual respect can only break down." 34 U. Chi. L. Rev. 342, 357 (1967).

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

²⁴ "Standing reflects whether the defendant has been affected in a manner that is within the scope of the fourth amendment's protection Because of the intimate relationship between standing and the constitutional guarantee, it is necessary that standing be consistent with the desired goals of the exclusionary rule, the expressed means for enforcing that guarantee." Note, 1965 Wash. U.L.Q. 488, 518-19.

tection of society as a whole from illegal police conduct,²⁵ see *Terry v. Ohio*, 390 U.S. —, 88 S. Ct. 1868, 1875 (1968); *Linkletter v. Walker*, 381 U.S. 618 (1965); Comment, 34 U. Chi. L. Rev. 342 (1967), as well as a device for maintaining judicial integrity. *Terry v. Ohio*, *supra*. To achieve these purposes of the exclusionary rule, the entire concept of standing as a prerequisite to allege a Fourth Amendment violation must be modified. This was done by the Supreme Court of California in *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). There, Justice Traynor reasoned that *any* use of illegally obtained evidence would (1) undermine the deterrent effect of the exclusionary rule²⁶ and (2) place the courts in a position of condoning illegal police practices. Thus he concluded:

"Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible *whether or not it was obtained in violation of the particular defendant's constitutional rights.*" *Id.* at 761, 290 P.2d at 857. (Emphasis added.)

²⁵ See the remarks of Justice Jackson in *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (dissenting opinion):

"Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror into every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

²⁶ California adopted the exclusionary rule shortly before the *Martin* case. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

The *Martin* rule²⁷ seems to be the only effective way of protecting the rights guaranteed by the Fourth Amendment. It is respectfully submitted therefore that the present formulation of the standing requirement in *Jones* be abandoned in favor of the California rule that a defendant has standing to object to the admission against him of any unconstitutionally seized evidence. See Comment, 34 U. Chi. L. Rev. 342 (1967); Note, 1965 Wash. U.L.Q. 488, 518-20. Only in this way can the "reasonable expectations" of the people to be let alone be realized.

Conclusion

The case should be remanded to the District Court for the purpose of conducting an adversary hearing to determine whether any evidence directly or indirectly derived from illegal electronic surveillance in any manner tainted petitioner's conviction. To enable petitioner to vindicate his Fourth Amendment rights, the Government should be required, at or prior to such hearing, to turn over to petitioner and his counsel all records of electronic surveillances which were directed at him, at his codefendant, or at the unindicted co-conspirators. In other words, the petitioner has standing to object to the direct or indirect use

²⁷ This rule is consistent with the most recent formulation of the standing requirement by this Court.

"The gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast v. Cohen*, 390 U.S. —, 88 S. Ct. 1942, 1952 (1968).

It is submitted that any criminal defendant against whom illegally seized evidence is to be introduced has the requisite adverseness.

against him of all of the above records of electronic surveillance, whether or not the surveillances took place at his premises, at the premises of indicted or unindicted co-conspirators, or the premises of innocent third persons, and whether or not petitioner was a party to the overheard conversations.

In the event the Government pleads that national security or the rights of innocent third persons is at stake, the Court in a private hearing attended by petitioner and counsel should adjudicate whether the claim of privilege has been established; if the claim of privilege has been established, then the Court should enter a protective order prohibiting dissemination of the information but continue with the inquiry at a private hearing from which the public but not petitioner or his counsel would be barred. If this course is not satisfactory to the Government, it has the choice of withdrawing or terminating the prosecution it instituted or of submitting to the needs of a civilized administration of criminal justice. Anything less fails to conform with fundamental fairness or to accord petitioner his guarantees under the Fourth and Sixth Amendments and makes these guarantees meaningless.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 11

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

No. 197

JOHN WILLIAM BUTENKO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 17-43) is reported at 384 F. 2d 554.

JURISDICTION AND QUESTIONS PRESENTED

The judgment of the court of appeals was entered on October 6, 1967 (A. 44). By orders of October 25, November 3, and November 14, 1967, Mr. Justice Brennan extended the time for filing the petitions for

certiorari herein until December 5, 1967, and the petitions were filed on that date. On January 23, 1968, a motion to amend the petitions for certiorari was filed. Certiorari was granted on June 17, 1968, limited to the following questions:

On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendants?

(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveil-

lance, whether or not he was present on the premises or party to the overheard conversation?

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

After a jury trial in the District of New Jersey, petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. 794 (a) and (c) (Count One), and of conspiring to violate 18 U.S.C. 951 by causing Butenko unlawfully to act as an agent of the Soviet Union without prior notification to the Secretary of State (Count Two). Butenko was also convicted of the substantive offense of unlawfully acting as an agent of the Soviet Union in violation of 18 U.S.C. 951 (Count Three). Butenko received concurrent sentences of 30 years, 10 years and 5 years' imprisonment on the three counts on which he was convicted, and Ivanov received concurrent sentences of 20 years' imprisonment on Count One and 5 years on Count Two. The court of appeals affirmed the conviction of Butenko on all counts, affirmed Ivanov's conviction on Count One, but set aside his conviction on Count Two.¹

¹ The court of appeals held that the government had failed to prove that Ivanov knew that Butenko had not registered with the Secretary of State and, therefore, reversed the conviction on Count Two. The government is not seeking review of that decision.

ARGUMENT

Conversations of each of the petitioners in these cases were overheard by the use of electronic surveillance equipment.² We submit, however, that an *in camera* examination of the records of the overheard conversations would establish to the satisfaction of the trial judge that the surveillance could not possibly have furnished leads to any evidence used against petitioners. Accordingly, for the reasons elaborated in our brief in *Alderman v. United States*, No. 133, October Term, 1967,³ we believe immediate disclosure to petitioners inappropriate and suggest that the causes be remanded to the district court for an *in camera* inspection of the materials, which the government undertakes to submit for that purpose.

There is no occasion to repeat what we said in our *Alderman* brief in answer to the Court's particularized inquiries. Those responses are fully applicable here. We turn, instead, to the special considerations which argue uniquely against automatic disclosure in circumstances like those presented in these cases.

1. Proper consideration of the question must begin with the historical fact that, at least since 1940, electronic surveillance, involving the overhearing of tele-

² In some of the instances the installation had been specifically approved by the then Attorney General. In others the equipment was installed under a broader grant of authority to the F.B.I., in effect at that time, which did not require specific authorization. As noted below, present Department of Justice policy would call for specific authorization from the Attorney General for any use of electronic equipment in such cases.

³ Copies of that brief have been served on counsel for petitioners in these cases.

phone calls and other conversations, has been consistently employed by the government of the United States to obtain foreign intelligence information and to protect national defense material and information from espionage and sabotage. As an express Executive policy, this practice dates from a confidential directive from President Roosevelt to Attorney General Jackson on May 21, 1940. President Truman reaffirmed the policy in 1946 and all succeeding Attorneys General have followed it. See generally, Rogers, *The Case for Wire Tapping*, 63 Yale L.J. 792 (1954). In 1965, acting on directions from President Johnson,⁴ Attorney General Katzenbach expressly limited the use of electronic surveillance to investigations involving the national security. Similarly, the present Attorney General, although prohibiting other wiretapping and eavesdropping by the Executive Branch, has recognized an exception for national security investigations:

Special problems arising with respect to the use of devices of the type referred to herein in national security investigations shall continue to be taken up directly with the Attorney General in the light of existing stringent restrictions.⁵

The practical necessity for this Executive policy is not open to serious question. Surely, in today's world, no one doubts that it is vital to the survival

⁴ Memorandum of June 30, 1965; N.Y. Times, July 16, 1965, p. 6.

⁵ Memorandum of Attorney General Clark of June 16, 1967.

of the nation for the government to maintain an effective system for gathering intelligence information relating to foreign affairs. Equally obvious is the real danger presented by efforts of foreign powers to learn our vital defense secrets. In light of these realities, it is hard to conclude that surveillance activities of the kind involved here are barred by the Fourth Amendment. That Amendment forbids only "unreasonable searches and seizures." Both on historical and practical grounds it is not inappropriate to conclude that the sort of surveillance involved here is reasonable. For, as this Court has said, "while the Constitution protects against invasions of individual rights, it is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160; *Aptheker v. Secretary of State*, 378 U.S. 500, 509; it "does not withdraw from the Government the power to safeguard its vital interests," *United States v. Robel*, 389 U.S. 258, 267.

It is at least arguable that, within this narrow area, the Executive has independent constitutional authority. The Court has recognized that the "President * * * possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109. See, also, *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 314. And, when exercising those powers, the Executive's action normally is beyond judicial review:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs,

has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of an Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * * [*Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, *supra*, at 111]

Thus, a good case can be made for the proposition that the Executive is empowered to determine for itself when it is "reasonable" to utilize electronic surveillance in intelligence gathering and counterespionage operations: See Mr. Justice White, concurring, in *Katz v. United States*, 389 U.S. 347, 363-364. Cf. *Abel v. United States*, 362 U.S. 217 (involving the question of administrative arrest); *Ex Parte Quirin*, 317 U.S. 1; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L. Rev. 891, 919-920 (1960); Westin, *Privacy and Freedom* 391 (1967). Indeed, the Congress has apparently concluded that the President does possess such power, for the recent legislation governing the interception of wire and oral communications (Omnibus Crime Control and Safe Streets Act of 1968, Section 2511(3), 82 Stat. 213) expressly provides:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect

the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. * * *

2. In suggesting the constitutional propriety of electronic surveillance to safeguard the national security, we do not tender that question for decision here. To be sure, it could be argued that the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, can have no application to *legally* obtained evidence, since its sole function is to assure compliance with the Fourth Amendment. Yet, there may be independent considerations of due process which argue for excluding evidence obtained by undisclosed means, among them the inability of the defendant to traverse effectively the government's allegation that the underlying surveillance was undertaken for national security reasons. Moreover, the special constitutional prerogatives of the Executive may be more attenuated when he invokes the judicial process. Just as the Legislative Branch enjoys greater latitude when it imposes internal discipline (e.g., *McGrain v. Daugherty*, 273 U.S. 135) than when it resorts to the courts (e.g., *Deutch v. United States*, 367 U.S. 456), so the broad powers of the President with respect to intelligence and counterespionage operations may not fully carry-over when judicial proceedings are instituted against an individual.

At all events, the government has not claimed that evidence obtained by electronic eavesdropping in the

course of a national security investigation is admissible in a criminal trial. And we do not advance that argument here. On the contrary, we adhere to the submission already made in these cases, that the records of the overheard conversations ought to be turned over to the trial judge for a determination whether anything in them was arguably useful to the prosecution. Yet, it is relevant that the surveillance was presumptively legitimate, undertaken for national security purposes.

As we have already noted, the very nature of the operations involved in this area often makes it impossible for the government to disclose its activities publicly—even to the extent necessary to establish that they were constitutionally proper—without seriously compromising the national security. And, of course, the Executive is privileged to refuse disclosure in these circumstances. *Totten v. United States*, 92 U.S. 105; *United States v. Reynolds*, 345 U.S. 1. See, generally, Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875 (1966). That leaves only a hard choice between jeopardizing internal security or risking foreign embarrassment, on the one hand, and letting a serious criminal go free, on the other. See, e.g., *United States v. Andolschek*, 142 F. 2d 503 (C.A. 2). At the least, we submit the government should not be put to that election in those situations where the district judge can easily determine from an examination of the records of the overheard conversation that they supplied no leads to any of the evidence used against the defendants.

CONCLUSION

The judgment of the court of appeals should be vacated and the cases remanded to the district court with the following instructions:

As to each defendant—

1. The government shall deliver to the trial judge, for his *in camera* inspection, all records resulting from electronic surveillance of conversations to which the defendant was a party or which occurred on premises in which he then had a protectable interest;

2. If the trial judge concludes from an examination of the materials submitted that nothing overheard was arguably relevant to the prosecution of the defendant, he shall decline production and shall order the records sealed and preserved for appellate review;

3. If the trial judge is unable to determine with certainty that the overheard conversations were unrelated to the prosecution of the defendant, he shall order the government either to make disclosure to the defendant or to dismiss the prosecution against him.

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SEPTEMBER 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 11

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

The United States petitions the Court to grant a rehearing in this case and modify its opinion and its decision. We limit our request to that portion of the decision which relates to the disclosure to defendants of the results of electronic surveillance relating to the gathering of foreign intelligence information, which term we use to include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage.

We are seeking this relief because of concern that our prior submission may not have made sufficiently clear to the Court all the implications of the problem

and the adverse impact upon government intelligence activities in the field of foreign affairs which would result from the broad disclosure the opinion seemingly contemplates. In addition, the decision apparently rests upon the assumption that the electronic surveillance involved in gathering foreign intelligence information was illegal. In point 1 below, however, we contend that such gathering was legal.

In presenting this petition, we do not use the term "national security." We recognize that that phrase can be given a broad meaning covering such matters as organized crime and internal security. Our submission here is limited to the narrow category of the gathering of foreign intelligence information, *i.e.*, matters affecting the external security of the country, and where the Attorney General has expressly authorized the surveillance¹ and where he files a certificate that disclosure of the information would prejudice the national interest.² Within that narrow compass, we believe that the decision in these cases poses sufficiently serious problems to the protection of that security that

¹ In our earlier brief in this case we advised the Court that in some instances the electronic surveillance involved had been instituted without the express approval of the Attorney General. Brief for the United States, p. 4., n. 2. We do not seek rehearing with regard to those installations not expressly authorized by the Attorney General.

Accordingly, this petition is filed only in the case of *Ivanov*, No. 11, and only with regard to those surveillances expressly authorized by the Attorney General for the purpose of gathering foreign intelligence information.

² Cf. *United States v. Reynolds*, 345 U.S. 1. See also *Ex parte Quirin*, 317 U.S. 1, where this Court impounded the record on the basis of national security considerations. Journal of the Supreme Court for July 29, 1942, October Term, 1942, p. 2.

it should be modified to provide for *in camera* scrutiny by the district court before records of surveillance made in such gathering should be disclosed to defendants.

1. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

It cannot be supposed that when this amendment was adopted it was directed against the collection of foreign intelligence information. The prohibition of the amendment is against "unreasonable searches and seizures." That which has long been practiced, by all nations, in the interests of self-preservation, cannot easily be regarded as unreasonable.

When the effect of the Amendment was limited to physical searches and seizures, there was little occasion to be concerned about its application to foreign intelligence information. The process of extending its application to communications, which has only recently culminated in the decision of *Katz v. United States*, 389 U.S. 347, has presented wholly new problems, for foreign intelligence activities often involve messages and communications, written and spoken. There are many instances in history, including the history of the United States, where the interception of messages has played an important role. The Zimmerman note of 1916 and MAGIC in 1940-1941, may serve as examples. The question is comprehensively discussed in D. Kahn, *The Code Breakers* (1968).

Never in our history has it been suggested that such activities were unconstitutional.

There was a time, in 1929, when Secretary Stimson closed the facilities for such work, as a matter of policy. D. Kahn, *supra*, at p. 360. However, as Secretary of War, he reestablished this work in 1940, and, under the authority of President Roosevelt and every succeeding President, such activities have been carried on ever since. The electronic surveillance to which we refer here was done under the explicit authority of the Attorney General, acting pursuant to authority delegated to him by the President in carrying out his duty to conduct foreign relations and to protect and defend the United States.

Congress in enacting the Crime Control Act of 1968 expressly recognized the President's authority to order electronic surveillance

to protect the Nation against actual or potential attack or other hostile acts of a foreign power, or to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. * * *

Omnibus Crime Control and Safe Streets Act of 1968, § 2511(3) 82 Stat. 197, 214.³

³ Since, in enacting the Crime Control Act of 1968, Congress determined that it did not wish to interfere with the President's power in this regard, the Act provides no requirement or procedure for obtaining a warrant to conduct electronic surveillance for the purpose of gathering foreign intelligence information.

Thus, both the Executive and the Legislative branches of the government, having great responsibilities in this area, have concluded that actions of the sort involved here are not "unreasonable," and thus not within the prohibitions of the Fourth Amendment. These determinations of coordinate branches of the Federal Government are entitled to great weight, even on a constitutional question. Moreover, we are dealing with the area of foreign relations. This Court has, of course, recognized that the "President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109. See the *Brief for the United States* previously filed in this case, pp. 4-8.

We, therefore, submit that the electronic surveillances involved which were authorized by the Attorney General were not illegal and that the government, accordingly, should not be required to make any disclosure to petitioner. We would be willing to submit the logs of the overheard conversations to a court for its *in camera* examination. From the nature of the premises subject to the surveillances at issue, such examination of the logs would make it clear beyond any doubt that the surveillances were being maintained solely to gather foreign intelligence information.

2. But even if the Court is not persuaded that it should rule here that the surveillances at issue were constitutionally conducted, we urge that disclosure to the defendant should not be required in this case.

In *Nardone v. United States*, 308 U.S. 338, 341, which involved wire-tapping, this Court stated:

The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established * * * the trial judge must give opportunity, however, closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. * * *

In this case, petitioner has not met either of these burdens. Petitioner produced no evidence that the government employed any electronic surveillance. The problem here arises because Solicitors General have been meticulous in advising the Court of all instances of electronic surveillance which come to their attention, even when they are trivial and accidental. This has been because of the obligation on counsel for the government recognized by such cases as *Brady v. Maryland*, 373 U.S. 83, and the tradition of candor reflected in the statement of former Solicitor General Sobeloff quoted at page 87, n. 2, of that opinion. It is believed that these actions have been appropriate. Nevertheless, the great care taken to see that disclosure is made to the Court, even when the circumstances are trivial and accidental, should not lead to consequences which are so serious as to be out of proportion to the actual circumstances presented.

We do not quarrel with the general proposition that the government should come forward and disclose instances where a defendant has been overheard during the course of an electronic surveillance. We do submit, however, that the duty should not be an

absolute one. There should be some room for balancing the possible benefits to be derived from disclosure against the damage to the national interest. Here the question is when the government must disclose information to a defendant so that he may attempt to establish that its seizure was illegal and that it was used against him. In carrying out our duty to the Court, we have, under the general rule of *Brady v. Maryland*, *supra*, gone beyond *Nardone*, under which the government has no duty to come forward to bring a search and seizure to the defendant's attention. *Brady v. Maryland* does not, however, require the government to disclose irrelevant material to the defendant. Thus, in *Brady*, this Court said, p. 87, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material* either to guilt or to punishment" (Emphasis added).

There would, therefore, seem to be no constitutional requirement that the government need disclose irrelevant overhearings to the defendant. In a situation involving the gathering of foreign intelligence information, we submit that the Court should adopt a test which balances the interests to be served by disclosure against the interests to be protected by nondisclosure.

Here, where it is clear from the nature of the premises subject to the surveillance that the surveillance was being conducted to obtain foreign intelligence information, we submit that the national interest should outweigh the possible interest of a defendant in examining material which the government and a

federal judge have determined is not even arguably relevant to his case.

The rule of disclosure is a good norm, a general rule of wide application; but it need not be universal. There is no need to accept "The tendency of a principle to expand itself to the limit of its logic," as then Judge Cardozo put the underlying problem.⁴ All law, including constitutional law, involves the resolution of competing claims. Professor Freund has recently referred to "the great antinomies of our aspirations: liberty and order; privacy and knowledge; stability and change; security and responsibility."⁵ In the classic phrasing of this Court: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."⁶ We submit that that point has been reached in this case.

3. The Court's opinion, as written, is broad enough to be applicable to another type of case, which was not actually before the Court in the presentations which were made to it. This is the situation where, during the course of gathering foreign intelligence information, a person who is or becomes a defendant in an ordinary criminal case is overheard merely by accident or happenstance, because he simply stumbles into it. In such cases, the logs are brief, the character

⁴ *The Nature of the Judicial Process* 51 (1921).

⁵ Freund, *On Law and Justice* (1968).

⁶ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355.

of the premises involved shows the nature of the investigation, and a determination of irrelevancy can be quickly and clearly made.

This question is involved in two cases now pending before the Court on petitions for certiorari. These are *Clay v. United States*, No. 271, this Term, and *Mrkonjic-Ruiz v. United States*, No. 880, this Term, in both of which Additional Memoranda are being filed contemporaneously with this petition for rehearing.

There is real risk, we fear, that this important question may not have been adequately brought to the attention of the Court in the previous briefs and oral arguments, and that it may have been lost sight of in the process of disposing of the other problems presented. Consideration of the problem of disclosure in connection with electronic surveillance began in a purely domestic context, in the *Alderman* case, which was first argued on May 2, 1968. It was only after the argument there that certiorari was granted in the cases of *Ivanov* and *Butenko*, and these cases were included in the reargument which was held on October 14, 1968. It is true that *Ivanov* and *Butenko* involved the gathering of foreign intelligence information. But the question was considered in the context of the *Butenko* and *Ivanov* cases themselves, in both of which there were surveillances directed against the two defendants then before the Court.⁷

⁷ The Court's decision as to standing removes any problem of prejudice to the national interest from the case as far as *Butenko* is concerned, since his conversations were heard only at his office.

There was no case then before the Court, on the merits, involving solely the situation which now gives great concern, and no argument was specifically directed to that situation. This is where the individual overheard was not *himself* the subject of surveillance, but where his conversation was heard incidentally and accidentally, and wholly irrelevantly, in connection with an investigation designed to obtain foreign intelligence information.

The Court's opinion, however, is sweeping, and is, in terms, applicable to all cases, no matter what the underlying situation. But the problem has many facets, and we submit that some of these require further consideration from the Court. As we point out in the Additional Memorandum which we are filing in *Mrkonjic-Ruzic v. United States*, No. 880, this Term, the result of the decision as it now stands "is, in practical terms, to provide the defendant with immunity from prosecution for all crimes past, present or future"—and, we may add, to point the way for the well-advised person to obtain such immunity by simply making a telephone call. This does not seem to be either a necessary or a desirable result.

We urge that the opinion in the *Alderman* case be modified so as to allow an exception under which disclosure may be made to the court alone where the nature of the premises involved is such as to make it plain that the investigation involved the gathering of foreign intelligence information, and where the Attorney General files a certificate that disclosure of the information would prejudice the national interest.

In such cases, if the court finds that the material is not arguably relevant to the pending prosecution, no further disclosure should be required.

In the alternative, we suggest the following for the consideration of the Court:

When the government instituted its practice of voluntarily disclosing to the Court instances of electronic surveillance, it did not envisage the possibility that disclosure might be required in cases where (1) the defendant himself was not the subject of the surveillance, but inadvertently was overheard during a foreign intelligence surveillance, and (2) his overheard conversations bore no conceivable relevance to the issues in the criminal case. After more careful examination of the concrete situation, we do not believe that the government's duty of candor to the Court required the disclosure of such eavesdropping, and it is our judgment that, within the rule of *Brady v. Maryland, supra*, it was unnecessary. To whatever extent we did consider the possibility of such disclosure, we assumed that, because of its impact upon the gathering of foreign intelligence information, we would not be required to make information available to the defendant unless the trial court had first concluded in an *in camera* inspection that it was at least relevant to the issues in the case.

With respect to this limited category of information—conversations by a defendant which are overheard during a foreign intelligence surveillance as to

which he was a total outsider, where he simply stumbled in, and which have no possible relevance to the criminal case—the considerations noted above lead us to think that it would be appropriate for us to modify our prior practice of informing the Court about the existence of such eavesdropping. We would continue to bring to the Court's attention all instances of illegal electronic surveillance that are directed against the defendant or contain any possibly relevant information in the criminal case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58(1) of the Rules of this Court, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

ERWIN N. GRISWOLD,
Solicitor General.

SUPREME COURT OF THE UNITED STATES

Nos. 133, O. T., 1967; AND 11, 197, O. T., 1968.

Willie Israel Alderman et al., Petitioners, 133, O. T., 1967 v. United States.	} On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
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Igor A. Ivanov, Petitioner, 11 v. United States.	} On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
John William Butenko, Petitioner, 197 v. United States.	

[March 10, 1969.]

MR. JUSTICE WHITE delivered the opinion of the Court.

After the convictions of petitioners had been affirmed, and while their cases were pending here, it was revealed that the United States had engaged in electronic surveillance which might have violated their Fourth Amendment rights and tainted their convictions. A remand to the District Court being necessary in each case for adjudication in the first instance, the questions now before us relate to the standards and procedures to be followed by the District Court in determining whether any of the Government's evidence supporting these convictions was the product of illegal surveillance to which any of the petitioners are entitled to object.

No. 133, O. T., 1967. Petitioners Alderman and Alderisio, along with Ruby Kolod, now deceased, were convicted of conspiring to transmit murderous threats in interstate commerce, 18 U. S. C. §§ 371, 875 (c). Their convictions were affirmed on appeal, 371 F. 2d 983

(C. A. 10th Cir. 1967), and this Court denied certiorari, 389 U. S. 834 (1967). In their petition for rehearing, petitioners alleged they had recently discovered that Alderisio's place of business in Chicago had been the subject of electronic surveillance by the Government. Reading the response of the Government to admit that Alderisio's conversations had been overheard by unlawful electronic eavesdropping,¹ we granted the petition for rehearing over the objection of the United States that "no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution." In our *per curiam* opinion, 390 U. S. 136 (1968), we refused to accept the *ex parte* determination of relevance by the Department of Justice in lieu of adversary proceedings in the District Court, vacated the judgment of the Court of Appeals and remanded the case to the District Court for further proceedings.

The United States subsequently filed a motion to modify that order. Although accepting the Court's order insofar as it required judicial determination of whether any of the prosecution's evidence was the product of illegal surveillance, the United States urged that in order to protect innocent third parties participating or referred to in irrelevant conversations overheard by the Government, surveillance records should first be subjected to *in camera* inspection by the trial judge, who would then

¹ In its brief on reargument, the Government suggests that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him. The Government also contends that Alderisio himself did not have desk space at the subject premises. Finally, the Government asserts that Alderman neither participated in any conversation overheard nor had any interest in the places which were the object of the surveillance. These allegations by the Government will have to be considered by the District Court in the first instance, and we express no opinion now on their merit.

turn over to the petitioners and their counsel only those materials arguably relevant to their prosecution. Petitioners opposed the motion, and the matter was argued before the Court last Term. We then set the case down for reargument at the opening of the current Term, 392 U. S. 919 (1968), the attention of the parties being directed to the disclosure issue and the question of standing to object to the Government's use of the fruits of illegal surveillance.²

Nos. 11 and 197. Both petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States, 18 U. S. C. §§ 794 (a), (c), and of conspiring to violate 18 U. S. C. § 951 by causing Butenko to act as an agent of the Soviet Union without prior

² In our order of June 17, 1968, restoring the Government's motion to the calendar for reargument, 392 U. S. 919-920, we requested counsel to include the following among issues to be discussed in briefs and oral argument:

"(1) Should the records of the electronic surveillance of petitioner Alderisio's place of business be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioners, and if so to what extent?

"(2) If *in camera* inspection is authorized or ordered, by what standards (for example, relevance and considerations of injury to persons or to reputations) should the trial judge determine whether the records are to be turned over to petitioners?

"(3) What standards are to be applied in determining whether each petitioner has standing to object to the use against him of the information obtained from the electronic surveillance of petitioner Alderisio's place of business? More specifically, does petitioner Alderisio have standing to object to the use of any or all information obtained from such electronic surveillance whether or not he was present on the premises or party to a particular overheard conversation? Also, does petitioner Alderman have standing to object to the use against him of any or all information obtained from the electronic surveillance of petitioner Alderisio's business establishment?"

notification to the Secretary of State. Butenko was also convicted of a substantive offense under 18 U. S. C. § 951. The Court of Appeals affirmed all but Ivanov's conviction on the second conspiracy count. 384 F. 2d 554 (C. A. 3d Cir. 1967). Petitions for certiorari were then filed in this Court, as was a subsequent motion to amend the *Ivanov* petition to raise an issue similar to that which was presented in No. 133.³ Following the first argument in *Kolod v. United States*, the petitions for certiorari of both Ivanov and Butenko were granted, limited to questions nearly identical to those involved in the reargument of the *Alderman* case.⁴

³ The United States admits overhearing conversations of each petitioner, but where the surveillance took place and other pertinent details are unknown. In its brief the Government states:

"In some of the instances the installation had been specifically approved by the then Attorney General. In others the equipment was installed under a broader grant of authority to the F. B. I., in effect at that time, which did not require specific authorization. . . . [P]resent Department of Justice policy would call for specific authorization from the Attorney General for any use of electronic equipment in such cases."

In all three cases, the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful. Our assumption, for present purposes, is that the surveillance was illegal.

⁴ In each case the grant of certiorari, 392 U. S. 923-925, was limited to the following questions:

"On the assumption that there was electronic surveillance of petitioner or a co-defendant which violated the Fourth Amendment,

"(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

"(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

"(3) What standards are to be applied in determining whether

I.

The exclusionary rule fashioned in *Weeks v. United States*, 232 U. S. 383 (1914), and *Mapp v. Ohio*, 367 U. S. 643 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. *Silverthorn Lumber Co. v. United States*, 251 U. S. 385, 391-392 (1920). Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. *Silverman v. United States*, 365 U. S. 505 (1961); *Katz v. United States*, 389 U. S. 347 (1967).

In *Mapp* and *Weeks* the defendant against whom the evidence was held to be inadmissible was the victim of the search. However, in the cases before us each petitioner demands retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or coconspirator.

This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is ad-

petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

"(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

"(b) Does a co-defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?"

mittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and codefendants have been accorded no special standing.

Thus in *Goldstein v. United States*, 316 U. S. 114 (1942), testimony induced by disclosing to witnesses their own telephonic communications intercepted by the Government contrary to 47 U. S. C. § 605 was held admissible against their coconspirators. The Court equated the rule under § 605 with the exclusionary rule under the Fourth Amendment.⁵ *Wong Sun v. United States*, 371 U. S. 471 (1963), came to like conclusions. There, two defendants were tried together; narcotics

⁵ As the issue was put and answered by the Court:

"The question now to be decided is whether we shall extend the sanction for violation of the Communications Act so as to make available to one not a party to the intercepted communication the objection that its use outside the courtroom, and prior to the trial, induced evidence which, except for that use, would be admissible.

"No court has ever gone so far in applying the implied sanction for violation of the Fourth Amendment. While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. *A fortiori* the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act." 316 U. S., at 121.

The Court noted that the principle had been applied "in at least fifty cases by the Circuit Courts of Appeals . . . not to mention many decisions by District Courts." *Id.*, at 121, n. 12.

seized from a third party were held inadmissible against one defendant because they were the product of statements made by him at the time of his unlawful arrest. But the same narcotics were found to be admissible against the codefendant because "the seizure of this heroin invaded no right of privacy or person or premises which would entitle [him] to object to its use at his trial. Cf. *Goldstein v. United States*, 316 U. S. 114." *Wong Sun v. United States*, *supra*, at 492.

The rule is stated in *Jones v. United States*, 362 U. S. 257, 261 (1960):

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . . Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."⁶

This same principle was twice acknowledged last Term. *Mancusi v. DeForte*, 392 U. S. 364 (1968); *Simmons v. United States*, 390 U. S. 377 (1968).⁷

⁶ The "person aggrieved" language is from Fed. Rule Crim. Proc. 41 (e). *Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule.

⁷ *McDonald v. United States*, 335 U. S. 451 (1948), is not authority to the contrary. It is not at all clear that the *McDonald* opinion would automatically extend standing to a codefendant. Two of the five Justices joining the majority opinion did not read the opinion to do so and found the basis for the codefendant's standing to be the fact that he was a guest on the premises searched. "But even a guest may expect the shelter of the rooftop he is under

We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons v. United States*, 390 U. S. 377 (1968); *Jones v. United States*, 362 U. S. 257 (1960). Compare *Tileston v. United States*, 318 U. S. 44, 46 (1943). None of the special circumstances which prompted *NAACP v. Alabama*, 357 U. S. 449 (1958), and *Barrows v. Jackson*, 346 U. S. 249 (1953), are present here. There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when, as and if it becomes important for him to do so.

What petitioners appear to assert is an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.

The necessity for that predicate was not eliminated by recognizing and acknowledging the deterrent aim of the rule. See *Linkletter v. Walker*, 381 U. S. 618 (1965); *Elkins v. United States*, 364 U. S. 206 (1960). Neither those cases nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment. The deterrent values of preventing the

against criminal intrusion." *Id.*, at 461 (Jackson, J., concurring). Compare *Jones v. United States*, 362 U. S. 257 (1960). Nor does *Hoffa v. United States*, 385 U. S. 293 (1966), lend any support to petitioners' position, since the Court expressly put aside the issue of standing.

incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flaunt the rules escape unscathed. In this respect we are mindful that there is now a comprehensive statute making unauthorized electronic surveillance a serious crime.⁸ The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Without experience showing the contrary, we should not assume that this new statute will be cavalierly disregarded or will not be enforced against transgressors.

Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any pur-

⁸ Title III, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211-225. Not only does the Act impose criminal penalties upon those who violate its provisions governing eavesdropping and wiretapping, 82 Stat., at 213 (to be 18 U. S. C. § 2511) (fine of not more than \$10,000, or imprisonment for not more than five years, or both), but it also authorizes the recovery of civil damages by a person whose wire or oral communication is intercepted, disclosed, or used in violation of the Act, 82 Stat., at 223 (to be 18 U. S. C. § 2520) (permitting recovery of actual and punitive damages, as well as a reasonable attorney's fee and other costs of litigation reasonably incurred).

pose.⁹ But for constitutional purposes, we are not now inclined to depart from the existing rule that unlawful wiretapping or eavesdropping, whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion.

II.

In these cases, therefore, any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations. The United States concedes this much and agrees that for purposes of a hearing to determine whether the Government's evidence is tainted by illegal surveillance, the transcripts or recordings of the overheard conversations of any petitioner or of third persons on his premises must be duly and properly examined in the District Court.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, who are in partial dissent on this phase of the case, object to our protecting the homeowner against the use of third-party conversations overheard on his premises by an unauthorized surveillance. Their position is that unless

⁹ Congress has not done so. In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. Title III, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat., at 221 (to be 18 U. S. C. § 2518 (10) (a)). The Act's legislative history indicates that "aggrieved person," the limiting phrase currently found in Fed. Rule Crim. Proc. 41 (e), should be construed in accordance with existent standing rules. See Sen. Rep. No. 1097, U. S. Code, Cong. & Admin. News, 90th Cong., 2d Sess., at 1701-1702, 1717-1718 (July 20, 1968).

the conversational privacy of the homeowner himself is invaded, there is no basis in the Fourth Amendment for excluding third-party conversations overheard on his premises. We cannot agree. If the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third-party conversation—the homeowner may object to its use against him, not because he had any interest in the seized items as “effects” protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment.¹⁰ Nothing seen or found on the premises may legally form the basis for an arrest or search warrant or for testimony at the homeowner’s trial, since the prosecution would be using the fruits of a Fourth Amendment violation. *Silverthorn Lumber Co. v. United States*, 251 U. S. 385 (1920);

¹⁰ If the police enter a house pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and introduced in evidence in the prosecution of the homeowner, whether the narcotics belong to him or to a third party. *E. g., Harris v. United States*, 331 U. S. 145, 155 (1947). But if the officers have neither a warrant nor the consent of the householder, it is elementary Fourth Amendment law that the narcotics are suppressible on his motion. In both cases, however, the homeowner’s interest in the narcotics and his standing to object to their seizure are the same; and insofar as the Fourth Amendment’s protection of “effects” is concerned, the right of the officer to seize the contraband without a warrant and use it in evidence is identical. The reason that the narcotics may be seized and introduced in evidence in the first case where there was a valid warrant, in spite of the householder’s interest in the narcotics and his standing to object, but not in the second case where there was no warrant is not the simple reason suggested by Mr. Justice Harlan that the householder has a property interest in the narcotics and therefore has “standing” to object. Rather, it is because in the first case there was no illegal invasion of the premises, while in the second the officer’s entry and search violated the Fourth Amendment, the narcotics being the fruit of that illegality.

Johnson v. United States, 333 U. S. 10 (1948); *Wong Sun v. United States*, 371 U. S. 471 (1963).

The Court has characteristically applied the same rule where an unauthorized electronic surveillance is carried out by physical invasion of the premises. This much the dissent frankly concedes. Like physical evidence which might be seized, overheard conversations are fruits of an illegal entry and are inadmissible in evidence. *Silverman v. United States*, 365 U. S. 505 (1961); *Wong Sun v. United States*, *supra*. When *Silverman* was decided, no right of conversational privacy had been recognized as such; the right vindicated in that case was the Fourth Amendment right to be secure in one's own home. In *Wong Sun*, the words spoken by Blackie Toy when the police illegally entered his house were not usable against him because they were the fruits of a physical invasion of his premises which violated the Fourth Amendment.

Because the Court has now decided that the Fourth Amendment protects a person's private conversations as well as his private premises, *Katz v. United States*, 389 U. S. 347 (1967), the dissent would discard the concept that private conversations overheard through an illegal entry into a private place must be excluded as the fruits of a Fourth Amendment violation. Although officers without a valid warrant may not search a house for physical evidence or incriminating information, whether the owner is present or away, the dissent would permit them to enter that house without consent and without a warrant, install a listening device and use any overheard third-party conversations against the owner in a criminal case, in spite of the obvious violation of his Fourth Amendment right to be secure in his own dwelling. Even if the owner is present on his premises during the surveillance, he would have no complaint unless his own conversations were offered or used against him.

Information from a telephone tap or from the microphone in the kitchen or in the rooms of guests or children would be freely usable as long as the homeowner's own conversations are not monitored and used against him. Indeed, if the police, instead of installing a device, secreted themselves on the premises, they could neither testify about nor use against the owner anything they saw or carried away, but would be free to use against him everything they overheard except his own conversations. And should police overhear third parties describing narcotics which they have discovered in the owner's desk drawer, the police could not then open the drawer and seize the narcotics, but they could secure a warrant on the basis of what they had heard and forthwith seize the narcotics pursuant to that warrant.¹¹

¹¹ The dissent would also distinguish between the situation where a document belonging to a third party and containing his own words is seized from the premises of another without a warrant and the situation where the third party's words are spoken and overheard by electronic surveillance. Under the dissenting view the words of the third party would be admissible in the latter instance but not in the former. We would exclude the evidence in both cases.

So also we do not distinguish between electronic surveillance which is carried out by means of a physical entry and surveillance which penetrates a private area without a technical trespass. This much, we think, *Katz* makes quite clear. In either case, officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated but because his own were. Those who converse and are overheard when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance. Cf. *Mancusi v. DeForte*, 392 U. S. 364, 367-370 (1968). The Fourth Amendment protects reasonable expectations of privacy and does not protect persons engaged in crime from the risk that those with whom they associate or converse will cooperate with the Government. *Hoffa v. United States*, 385 U. S. 293, 303 (1966).

These views we do not accept. We adhere to the established view in this Court that the right to be secure in one's house against unauthorized intrusion is not limited to protection against a policeman viewing or seizing tangible property—"papers" and "effects." Otherwise, the express security for the home provided by the Fourth Amendment would approach redundancy. The rights of the owner of the premises are as clearly invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; and the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner but to others. Nor do we believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman*, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home. It was noted in *Silverman*, 365 U. S., at 511-512, that

"This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."

The Court proceeded to hold quite the contrary. We take the same course here.

III.

The remaining aspect of this case relates to the procedures to be followed by the District Court in resolving

the ultimate issue which will be before it—whether the evidence against any petitioner grew out of his illegally overheard conversations or conversations occurring on his premises.¹² The question as stated in *Wong Sun v. United States*, 371 U. S. 471, 488 (1963), is “‘whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’” See also *Nardone v. United States*, 308 U. S. 338, 341 (1939).

The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. However, the Government contends that it need not be put to this disclose or dismiss option in the instant cases because none of the information obtained from its surveillance is “arguably relevant” to petitioners’ convictions, in the sense that none of the overheard conversations arguably underlay any of the evidence offered in these cases. Although not now insisting that its own evaluation of relevance should be accepted automatically and without judicial scrutiny, the United States urges that the records of the specified conversations be first submitted to the trial judge for an *in camera* examination. Any record found arguably relevant by the judge would be turned over to the petitioner whose Fourth Amendment rights have been violated, and that petitioner would then have the opportunity to use the

¹² It seems that in none of these cases were there introduced any recordings, transcripts, or other evidence of the actual conversations overheard by electronic surveillance.

disclosed information in his attempt to show that the Government has used tainted evidence to convict him. Material not arguably relevant would not be disclosed to any petitioner.¹³

Although this may appear a modest proposal, especially since the standard for disclosure would be "arguable" relevance, we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge. Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoid-

¹³ This would be true even though the material on its face contained no threat of injury to the public interest or national security, apparently because, in the Government's view, it would be very difficult to distinguish between that which threatened and that which did not. As explained below, we think similar difficulties inhere in distinguishing between records which are relevant to showing taint and those which are not.

ably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case.¹⁴

The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. "[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was the fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." *Nardone v. United States*, 308 U. S. 338, 341 (1939). With this task ahead of them, and if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the

¹⁴ In both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where *in camera* procedures have been found acceptable to some extent. *Dennis v. United States*, 384 U. S. 855 (1966) (disclosure of grand jury minutes subject to *in camera* deletion of "extraneous material"); *Palmero v. United States*, 360 U. S. 343, 354 (1959) (whether the Jencks Act, 18 U. S. C. § 3500, requires disclosure of document to the defense); *Roviaro v. United States*, 353 U. S. 53 (1957) (disclosure of informant's identity). In the *Dennis* case the Court noted that ordinarily "[t]rial judges should not be burdened with the task or responsibility of examining sometimes voluminous grand jury testimony," and that it is not "realistic to assume that the trial court's judgment as to the utility of materials for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." 384 U. S., at 874-875.

Government was not entitled to use in building its case against them.

Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the petitioner.¹⁵

¹⁵ The dissenting opinions, it should be noted, would require turnover of arguably relevant material, whatever its impact on national security might be. To this extent there is agreement that the defendant's interest in excluding the fruits of illegally obtained evidence entitles him to the product of the surveillance. Given this basic proposition, the matter comes down to a judgment as to whether *in camera* inspection would characteristically be sufficiently reliable when national security interests are at stake. On this issue, the majority and the dissenters part company.

We think this resolution will avoid an exorbitant expenditure of judicial time and energy and will not unduly prejudice others or the public interest. It must be remembered that disclosure will be limited to the transcripts of a petitioner's own conversations and of those which took place on his premises. It can be safely assumed that much of this he will already know, and disclosure should therefore involve a minimum hazard to others. In addition, the trial court can and should, where appropriate, place petitioner and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect. See Fed. Rule Crim. Proc. 16 (e). We would not expect the district courts to permit the parties or counsel to take these orders lightly.

None of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense and fairness of the trial judge. See *Nardone v. United States*, 308 U. S. 338, 341-342 (1939).¹⁶

¹⁶ THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join the entire opinion of the Court. In addition, MR. JUSTICE HARLAN and MR. JUSTICE STEWART join the opinion to the extent that it denies standing to codefendants, coconspirators and others whose Fourth Amendment rights have not been violated by the electronic surveillance involved. The four members of the Court joining the entire opinion agree with the opinion in recognizing the householder's standing to object to evidence obtained from an unauthorized electronic surveillance of his premises even where his own conversations are not overheard; MR. JUSTICE FORTAS concurs in the judgment to this extent. Finally, MR. JUSTICE STEWART, in addition to the four members of the Court joining the entire opinion, agrees with Part III of the opinion.

IV.

Accordingly, in No. 133, O. T. 1967, the motion of the United States is denied to the extent that it requests an initial *in camera* inspection of the fruits of any unlawful surveillance and the withholding of those portions of the materials which the trial judge might deem irrelevant to these convictions. Primarily because of our decision with respect to standing, however, the order of January 29, 1968, is withdrawn. The order denying to petitioners a writ of certiorari is set aside. The petition for rehearing is granted, and the petition for certiorari is granted as to both Alderisio and Alderman. The judgment of the Court of Appeals for the Tenth Circuit in No. 133, O. T. 1967, and the judgment of the Court of Appeals for the Third Circuit in Nos. 11 and 197 are vacated, and each of the cases is remanded to the District Court for further proceedings consistent with this opinion, that is, for a hearing, findings, and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance. The District Court should confine the evidence presented by both sides to that which is material to the question of the possible violation of a petitioner's Fourth Amendment rights, to the content of conversations illegally overheard by surveillance which violated those rights and to the relevance of such conversations to the petitioners' subsequent convictions. The District Court will make such findings of fact on those questions as may be appropriate in light of the further evidence and of the entire existing record. If the District Court decides on the basis of such findings (1) that there was electronic

surveillance with respect to one or more petitioners but not any which violated the Fourth Amendment, or (2) that although there was a surveillance in violation of one or more of the petitioners' Fourth Amendment rights, the conviction of such petitioner was not tainted by the use of evidence so obtained, it will enter new final judgments of conviction based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. If, on the other hand, the District Court concludes in such further proceedings that there was a violation of any petitioner's Fourth Amendment rights and that the conviction of the petitioner was tainted by such violation, it would then become its duty to accord such petitioner a new trial.

Vacated and remanded.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, concurs in Part II of the opinion of MR. JUSTICE FORTAS and holds that the protection of the Fourth Amendment includes also those against whom the investigation is directed.

MR. JUSTICE STEWART. I join MR. JUSTICE HARLAN's dissenting opinion, except insofar as it would authorize *in camera* proceedings in the *Ivanov* and *Butenko* cases. I would apply the same standards to all three cases now before us, agreeing to that extent with the opinion of the Court.

MR. JUSTICE BLACK dissents, adhering to his dissent in *Katz v. United States*, 389 U. S. 347, 364-374 (1967).

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 133, O. T., 1967; AND 11, 197, O. T., 1968.

Willie Israel Alderman et al., Petitioners, 133, O. T., 1967 v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
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Igor A. Ivanov, Petitioner, 11 v. United States.	}	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
John William Butenko, Petitioner, 197 v. United States.		

[March 10, 1969.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The Court's careful opinion is, I think, constructed on a faulty premise, which substantially undermines the validity of its ultimate conclusions. The majority confronts this case as if each of the two major problems it raises can be solved in only one of two ways. The Court seems to assume that *either* the traditional standing doctrine is to be expanded *or* that the traditional doctrine is to be maintained. Again, it is assumed that *either* an *in camera* decision is to be made by the judge in every case *or* that there is to be an automatic turnover of all conversations in every case. I do not believe, however, that the range of choice open to us on either issue is restricted to the two alternatives the Court considers. On both issues, there is a third solution which would, in my view, more satisfactorily accommodate the competing interests at stake.

I.

STANDING.

I am in substantial agreement with the reasons the Court has given for refusing to expand the traditional standing doctrine to permit a Fourth Amendment challenge to be raised either by a co-defendant or a co-conspirator.¹ But it does not follow from this that we may apply the traditional standing rules without further analysis. The traditional rules, as the majority correctly understands them, would grant standing with regard to (1) conversations in which the accused himself participated and (2) *all* conversations occurring on the accused's "premises," regardless of whether he participated in the particular conversation in any way. As I hope to show, the traditional rationale for this second rule—granting standing to the property owner—does not fit a case involving the infringement of conversational

¹ I also am unable to accept my Brother FORTAS' suggestion that standing be accorded to any defendant who can show that an illegal search or seizure was directed against him. As my Brother FORTAS himself recognizes in stopping short of an extreme position that rejects all standing limitations, a proper decision on this issue cannot only consider the fact that a broadened standing rule may add marginally to the impact of the exclusionary rule on unconstitutional police conduct. Rather, one must also consider that my Brother FORTAS' rule permits a defendant to invade the privacy of others to hear conversations in which he did not participate. Moreover, the rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads as to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was motivated by an effort to obtain information against the accused or some other individual. I do not believe that this administrative burden is justified in any substantial degree by the hypothesized marginal increase in Fourth Amendment protection.

privacy. Moreover, no other persuasive rationale can be developed in support of the property owner's right to make a Fourth Amendment claim as to conversations in which he did not himself participate. Consequently, I would hold that, in the circumstances before us, standing should be granted only to those who actually participated in the conversation that has been illegally overheard.

A.

There is a very simple reason why the traditional law of standing permits the owner of the premises to exclude a tangible object illegally seized on his property, despite the fact that he does not own the particular object taken by the police. Even though he does not have title to the object, the owner of the premises is in possession of it—and we have held that a property interest of even less substance is a sufficient predicate for standing under the Fourth Amendment. *Jones v. United States*, 362 U. S. 257 (1960).² This simple rationale does not, however, justify granting standing to the property owner with regard to third-party conversations. The absent

² The Court suggests, ante, at 11, n. 10, that I am wrong in finding that the traditional grant of standing to the property owner may properly be grounded on the simple fact of the owner's dominion over all physical objects on his premises. The majority argues that even though a particular object (say a packet of narcotics) is not described in a valid search warrant, it may nevertheless be seized if the police find the narcotics in their search for the other evidence of crime. It follows from this, says the Court, that the householder's possessory interest in the seized property is not a sufficient basis for standing. But this argument ignores the fact that an accused may have *standing* to raise a Fourth Amendment claim and yet lose on the *merits*. In the case the Court hypothesizes, the householder has standing because he has lost possession of an object formerly under his control. However, he loses on the merits because the police seizure was reasonable under the circumstances.

property owner does not have a property interest of any sort in a conversation in which he did not participate. The words that were spoken are gone beyond recall.³

Consequently, in order to justify the traditional rule, one must argue, as does the majority, that the owner of the premises should be granted standing because the bugged third-party conversations are "fruits" of the police's infringement of the owner's property rights. The "fruits" theory, however, does not necessarily fit when the police overhear private conversations in violation of the Fourth Amendment. As *Katz v. United States*, 389 U. S. 347, 352-353 (1967), squarely holds, the right to the privacy of one's conversation does not hinge on whether the Government has committed a technical trespass upon the premises on which the conversations took place. *Olmstead v. New York*, 277 U. S. 438 (1928), is no longer the law. If in fact there has been no trespass upon the premises, I do not understand how traditional theory permits the owner to complain if a conversation is overheard in which he did not participate. Certainly the owner cannot suppress records of such conversations on the ground that they are the "fruits" of an unconstitutional invasion of his property rights. See *Goldman v. United States*, 316 U. S. 129, 135-136 (1942).

It is true, of course, that the "fruits" theory would require a different result if the police used a listening device

³ Thus, unlike the Court, I find it quite easy to distinguish "between the situation where a document belonging to a third party and containing his own words is seized from the premises of another without a warrant and the situation where the third party's words are spoken and overheard by electronic surveillance." *Ante*, at 13, n. 11. While the absent owner can read the document when he returns to his home, he cannot summon back the words that were spoken in his absence. In the one case, the owner is personally aggrieved by the police action; in the other case, he is not.

which did physically trespass upon the accused's premises. But the fact that this theory depends completely on the presence or absence of a technical trespass only serves to show that the entire theoretical basis of standing law must be reconsidered in the area of conversational privacy. For we have not buried *Olmstead*, so far as it dealt with the substance of Fourth Amendment rights, only to give it new life in the law of standing. Instead, we should reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz*. Standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that *Katz* protects.⁴ On the other hand, property owners should not be permitted to assert a Fourth Amendment claim in this area if we are to respect the principle, whose vitality the Court has now once again reaffirmed, which establishes “the general rule that Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.” *Ante*, at 8. For granting property owners standing does not permit them to vindicate intrusions upon their *own* privacy, but simply permits criminal defendants to intrude into the private lives of others.

The following hypothetical suggests the paradoxical quality of the Court's rule. Imagine that I own an office building and permit a friend of mine, Smith, to use one of the vacant offices without charge. Smith uses the office to have a private talk with a third person, Jones. The next day, I ask my friend to tell me what Jones had said in the office I had given him. Smith replies that the conversation was private, and that what was said

⁴ It seems clear that, under the *Katz* rationale, a person is personally aggrieved by electronic surveillance not only when he is actually speaking but also when he is listening to the confidences of others.

was "none of your business." Can it be that I could properly feel aggrieved because the conversation occurred on my property? It would make no sense if I were to reply to Smith: "*My privacy* has been infringed if you do not tell me what was said, for I own the *property!*" It is precisely the other way around—Smith is telling me that when he and Jones had talked together, they had a legitimate expectation that their conversation would remain secret, even from me as the property owner.

Now suppose that I had placed a listening device in the office I had given to Smith, without telling him. Could anyone doubt that I would be guilty of an outrageous violation of the privacy of Smith and Jones if I then listened to what they had said? It would be ludicrous to defend my conduct on the ground that I, after all, was the owner of the office building. The case does not stand differently if I am accused of a crime and demand the right to hear the Smith-Jones conversation which the police had monitored. The Government doubtless has violated the privacy of Smith and Jones, but their privacy would be violated *further* if the conversation were also made available to me.⁵

In the field of conversational privacy, the Fourth Amendment protects persons, not places. See *Katz v. United States*, 389 U. S. 347, 351 (1967). And a man can only be in one place at one time. If the privacy of his conversation is respected at that place, he may engage in all those activities for which that privacy is an essential prerequisite. His *privacy* is not at all disturbed by the fact that other people in other places cannot speak without the fear of being overheard. That fact may be profoundly disturbing to the man whose privacy remains

⁵ This is not to say, of course, that the property owner could not bring a civil action to have the illegal listening device removed from his premises. He simply could not hear what the listening device had recorded, if none of his own conversations had been overheard.

intact. But it remains a fact about *other* people's privacy. To permit a criminal defendant to complain about such intrusions is to permit the vicarious assertion of Fourth Amendment rights—a step which I decline to take in relation to property owners for much the same reasons as those which have impelled the Court to deny standing to co-conspirators.

In rejecting the "property" rule advanced by the Court, I do not mean to suggest that standing may never properly be granted to permit the vicarious assertion of Fourth Amendment rights. While it is arguable that an individual should be permitted to raise a constitutional claim when the privacy of members of his family has been violated, I need not reach this question on the facts of the cases before us. It must be noted, however, that even if this Court recognized a man's right to protest whenever the privacy of his family was infringed, the lines the majority draws today would still seem extremely arbitrary. Under the prevailing "property" rule, for example, a husband generally cannot complain if the police overhear his wife talking at her office or in a public phone booth, cf. *Katz v. United States*, *supra*, although he can complain when the police overhear her talking at home. Yet surely the husband's interest in his wife's privacy is equally worthy of respect in all three cases. If standing is to be extended to protect a person's interest in his family's privacy, an individual should be permitted to make a constitutional claim *whenever* a family member's reasonable expectation of privacy has been infringed, regardless of the place where his privacy was invaded. Indeed, the Court's emphasis on property ownership could well mean that a husband, as owner of a particular property, is entitled to complain as to a violation of his wife's privacy, but that the wife could not complain as to the unlawful surveillance of her husband since she did not have a sufficiently substantial

interest in the property on which the intrusion occurred. In contrast, if a perfect stranger is overheard on one's property, standing is established. In sum, I simply cannot discern a coherent policy behind the Court's solicitude for property interests in this area.

B.

The Court's lengthy discussion of my position loses sight of the basic justification for the narrower standing rule I have advanced. To recapitulate, it is my central aim to show that the right to conversational privacy is a personal right, not a property right. It follows from this that the Court's rule permits property owners to assert vicariously the personal rights of others. Indeed, granting standing to property owners compromises the personal privacy of others.

The Court's response seems to be that the Fourth Amendment protects "houses" as well as "persons." But this is simply to treat private conversations as if they were pieces of tangible *property*. Since an individual cannot carry his possessions with him wherever he goes, the Fourth Amendment protects a person's "house" so that his personal possessions may be kept out of the Government's easy reach. In contrast, a man must necessarily carry his voice around with him, and cannot leave it at home even if he wished. When a man is not at home, he cannot converse there. There is thus no need to protect a man's "house" in order to protect his right to engage in private conversation. Consequently, the Court has not increased the scope of an accused's *personal* privacy by holding that the police have unconstitutionally invaded his "house" by putting a "bug" there. Houses don't speak; only people do. The police only have violated the *privacy* of those persons whose conversations are overheard.

I entirely agree, however, that if the police see a person's tangible property while committing their trespass, they may not constitutionally use this knowledge either to obtain a search warrant or to gain a conviction. Since a man has no choice but to leave the bulk of his physical possessions in his "house," the Fourth Amendment must protect his "house" in this way or else the immunity of his personal possessions from arbitrary search could not be assured. Thus if an individual's personal *possessions* are to be protected at all, they must be protected in his house; but a person's private *conversations* are protected as much as is possible when he can complain as to any conversation in which he personally participated. To go further and protect other conversations occurring on his property is simply to give the householder the right to complain as to the Government's treatment of others.

C.

While the Court grants special standing rights to property owners, it refuses to reach the question whether employees, business visitors, social guests, and other persons with less substantial property interests are also entitled to special standing privileges. Yet this question will be presented to the District Court on remand in the *Alderisio* case,⁶ and it will doubtless be an issue in many of the other cases now on our docket which we will remand for reconsideration in the light of our decision today. While a definitive solution to this problem is obviously premature, the Court's failure to give the lower courts any guidance whatever on this point will result in widespread confusion as trial judges throughout the land attempt to divine the rationale be-

⁶ As the Court points out, *ante*, at 2, n. 1, the Government denies that electronic surveillance took place on property owned by Alderisio. Rather, the premises were owned either by firms which employed Alderisio or by "business associates."

hind the property rule established today. Confusion will be compounded by our own past decisions which have decisively rejected the notion that the accused must necessarily have a possessory interest in the premises before he may assert a Fourth Amendment claim. See *United States v. Jeffers*, 342 U. S. 48 (1951); *Jones v. United States*, 362 U. S. 257 (1960); *Mancusi v. DeForte*, 392 U. S. 364 (1968). But it will not do simply to incorporate the standing law developed in those cases in an effort to solve the problem before us.⁷ For our past decisions involved situations in which the police search was directed against the individual seeking to invoke the Fourth Amendment. Here, however, the question is whether an individual may hear the conversations of third parties.⁸ If, for example, it develops at the hearing that petitioner Alderisio simply has a bare right to remain on the business premises that were bugged, compare *Jones v. United States*, *supra*, it surely could not be argued that his privacy had been infringed even though he had not been personally involved in any of the conversations that had been overheard. The Court seems duty bound to make at least this much clear.⁹

II.

IN CAMERA PROCEEDINGS.

While I would hold that property owners have no right as such to hear conversations in which they were

⁷ I have not thought it necessary to deal with the subsidiary question of the standing of any of these petitioners to challenge at trial any evidence submitted against them that is alleged to be a fruit of a bugged conversation in which they participated. I agree that this is a question that should be left to the District Court for determination in the first instance at the hearing on remand.

⁸ As the Court's justification of its "property" rule seems to center exclusively on the right of homeowners to protest intrusions into their homes it may well be that the rights of owners of business premises should be stringently limited.

not participants, it appears to me that at a minimum the Court should adopt the Government's suggested judicial screening procedure with regard to third-party conversations. Property owners should not be permitted to intrude into the private lives of others unless a trial judge determines that the conversation at issue is at least arguably relevant to the pending prosecution.

On the other hand, I would agree that in the typical case, the prosecution should be required to hand over the records of all conversations in which the accused played a part. Since the other parties to these conversations knew they were talking to the accused, they can hardly have an important interest in concealing from him what they said to him. Whatever risk of unauthorized disclosure that is involved may generally be minimized even further by the issuance of appropriate protective orders. Fed. Rules Crim. Proc. 16 (e).

There is, however, at least one class of cases in which the standard considerations do not apply. I refer to the situations exemplified by *Ivanov* and *Butenko*, in which the defendant is charged, under one statute or another, with spying for a foreign power. In contrast to the typical situation, here the accused may learn important new information even if the turnover is limited to conversations in which he was a participant. For example, he may learn the location of a listening device—a fact that may be of crucial significance in espionage work. Moreover, he will be entitled to learn this fact even though a valid warrant has subsequently been issued authorizing electronic surveillance at the same location. Similarly, the accused may find out that the United States has obtained certain information that his foreign government believes is still secret, even when our Government has also received this information from an independent source in a constitutional way. And he may

learn that those in whom he has been reposing confidence are in fact American undercover agents.

Even more important, there is much less reason to believe that a protective court order will effectively deter the defendant in an espionage case from turning over the new information he has received to those who are not entitled to it. For in an espionage case, the defendant is someone the grand jury has found is likely to have passed secrets to a foreign power. It is one thing to believe that the normal criminal defendant will refuse to pass on information if threatened with severe penalties for unauthorized disclosure. It is quite a different thing to believe that a defendant who is probably a spy will not pass on to the foreign power any additional information he has received.

Moreover, apart from the sense of fair play of most judges, additional safeguards could be devised which would assure that an *in camera* procedure would be used only when an unauthorized disclosure presents a substantial risk to the national security. As in the somewhat analogous situation in which the Government attempts to invoke a national security privilege in a civil action in order to trigger an *in camera* proceeding, there should "be a formal claim of privilege, lodged by the head of the department which has control of the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U. S. 1, 7-8 (1953). Indeed, I would go even further than did the Court in *Reynolds* and lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an *in camera* proceeding are real and not merely colorable.

The Court's failure to consider the special characteristics of the *Ivanov* and *Butenko* cases is particularly surprising in the light of the reasons it gives for creating an absolute rule in favor of an automatic turnover.

For the majority properly recognizes that its preference for a full adversary hearing cannot be justified by an easy reference to an absolute principle condemning *in camera* judicial decisions in all situations. Indeed, this Court has expressly authorized the use of such procedures in closely related areas involving the vindication of Fourth Amendment rights. See *Roviaro v. United States*, 353 U. S. 53 (1957); *McCray v. Illinois*, 386 U. S. 300, 309-313 (1967). If, as the Court rightly states, the propriety of an *in camera* screening procedure is a "matter of judgment," *ante*, at 17, depending on an informed consideration of all the competing factors, I do not understand why the trial judge should not be authorized to consider whether the accused simply cannot be trusted to keep the Government's records confidential. Nor do I understand why the Government must be confronted with the choice of dismissing the indictment or disclosing the information because the accused cannot be counted on to keep faith with the Court.⁹ Moreover, it is not difficult to imagine cases in which the danger of unauthorized disclosure of important information would clearly outweigh the risk that an error may be made by the trial judge in determining whether a particular conversation is arguably relevant to the pending prosecution. It may well be, for example, that the number of conversations at issue is very small. Yet though the Court itself recognizes that "the need for adversary inquiry is increased by the complexity of the issues presented for adjudication," *ante*, at 18, it nevertheless leaves

⁹ I would not, however, go so far as my Brother FORTAS, who would appear to require an *in camera* proceeding in any case in which the Government claims that a turnover would be prejudicial to the national security. I believe that this special procedure is only justified when the accused has been indicted for his espionage activities, indicating that he has probably passed records to a foreign power.

no room for an informed decision by the trial judge that the risk of error on the facts of a given case is insubstantial. Since the number of espionage cases is small, there is no chance whatever that these decisions will be made in a hurried fashion or that they will not be subjected to the most searching scrutiny on appeal. Of course, if any of the conversations should be found arguably relevant, their disclosure should be required before the prosecution is permitted to continue.

In sum, I would require the Government to turn over to Alderman and Alderisio only the records of those conversations in which each defendant participated, and I would leave the way open for a preliminary *in camera* screening procedure in the *Ivanov* and *Butenko* cases.

SUPREME COURT OF THE UNITED STATES

Nos. 133, O. T., 1967; AND 11, 197, O. T., 1968.

Willie Israel Alderman et al., Petitioners, 133, O. T., 1967 v. United States.	} On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
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Igor A. Ivanov, Petitioner, 11 v. United States.	} On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
John William Butenko, Petitioner, 197 v. United States.	

[March 10, 1969.]

MR. JUSTICE FORTAS, concurring in part and dissenting in part.

I.

In the present cases, the Court holds (1) that the Government may use evidence it obtains by unlawful electronic surveillance against any defendant who does not have "standing" to complain; (2) that a defendant has standing only if he was a party to the overheard conversation or if it took place on "his premises";¹ and (3) that all illegally obtained surveillance records as to which a defendant has standing (including national security information) must be submitted to the defendant or his counsel, subject to appropriate protective orders, and their relevance to the defendant's trial must be deter-

¹ The Court leaves the scope of the interest that the defendant must have in the "premises" to be determined in future litigation.

mined in adversary proceedings. The defendant is entitled to suppression or exclusion from his trial of such illegally obtained information and its fruits.

I find it necessary to file this separate opinion because I believe (1) that a person concerning whom an investigation involving illegal electronic surveillance has been conducted, as well as the persons given "standing" in the majority opinion, has the right to suppression of the illegally obtained material and its fruits; and (2) that it is permissible for the trial judge, subject to suitable specifications, to order that information vital to the national security shall be examined only *in camera* to determine its relevance or materiality, although I agree that all other information that may be the subject of a motion to suppress must be shown to the defendant or his counsel so that its materiality can be determined in an adversary hearing.

II:

The effect of the Court's decision, bluntly acknowledged, is to add another to the long list of cases in which the courts have tolerated governmental conduct that violates the Fourth Amendment. The courts have done this by resort to the legalism of "standing." See, *e. g.*, *Goldstein v. United States*, 316 U. S. 114, 121 (1942); *Wong Sun v. United States*, 371 U. S. 471 (1963). Cf., *United States v. Jeffers*, 342 U. S. 48 (1951); *Jones v. United States*, 362 U. S. 257 (1960); *Mancusi v. DeForte*, 392 U. S. 364 (1968).

It is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law. We do not subscribe to the totalitarian principle that the Government is the law, or that it may disregard the law even in pursuit of the lawbreaker. As this Court said in *Mapp v. Ohio*, 367 U. S. 643, 659 (1961), "Nothing can destroy a government more quickly

than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."²

The Fourth Amendment to our Constitution prohibits "unreasonable" governmental interference with the fundamental facet of individual liberty: "the right of the people to be secure in their persons, houses, papers, and effects." Mr. Justice Jackson recognized the central importance of the Fourth Amendment in his dissenting opinion in *Brinegar v. United States*, 338 U. S. 160, 180-181 (1949):

"Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates."

² Mr. Justice Brandeis elaborated this point more than 40 years ago:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. . . ." *Olmstead v. United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).

See also *Elkins v. United States*, 364 U. S. 206, 222 (1960); *Terry v. Ohio*, 392 U. S. 1, 13 (1968); *Goldstein v. United States*, 316 U. S. 114, 128 (1942) (dissenting opinion); *Irvine v. California*, 347 U. S. 128, 149 (1954) (dissenting opinion); Comment, 57 Col. L. Rev. 1159, 1167-1168 (1957).

rates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

It is disquieting when an individual policeman, through carelessness or ignorance or in response to the pressure of events, seizes a person or conducts a search without compliance with the standards prescribed by law. It is even more disturbing when law enforcement officers engage in unconstitutional conduct not because of their individual error but pursuant to a calculated institutional policy and directive.

Surreptitious electronic surveillance—the "uninvited ear" as my Brother WHITE calls it—is a "search and seizure" within the ambit of the Fourth Amendment. *Silverman v. United States*, 365 U. S. 505, 511 (1961); *Katz v. United States*, 389 U. S. 347, 353 (1967). It is usually the product of calculated, official decision rather than the error of an individual agent of the State. And because by nature it is hidden, unlawful electronic surveillance is even more offensive to a free society than the unlawful search and seizure of tangible material.

In recognition of the principle that lawlessness on the part of the Government must be stoutly condemned, this Court has ruled that when such lawless conduct occurs, the Government may not profit from its fruits. *Weeks v. United States*, 232 U. S. 383 (1914), held that in a federal prosecution the Government may not use evidence secured through an illegal search and seizure. In *Mapp v. Ohio*, *supra*, the exclusionary rule was applied to the States. In that case, the Court expressly recognized that only a prohibition of the use of unlawfully seized material could properly implement the constitutional prohibition. It acknowledged that other remedies were not effective sanctions. *Id.*, at 651-653. See also *Weeks v. United States*, *supra*, at 393; *Irvine v. California*, 347 U. S. 128, 137 (1954); *Wolf v. Colorado*, 338

U. S. 25, 41-47 (1949) (dissenting opinion); *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955). As this Court said in *Walder v. United States*, 347 U. S. 62, 64-65 (1954), "The Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction. . . . [T]hese methods are outlawed and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."³

But for reasons which many commentators charge are related more to convenience and judicial prudence than to constitutional principles, courts of all States except California⁴ and of the federal system, including this Court, have allowed in evidence material obtained by police agents in direct and acknowledged violation of the Fourth Amendment. They have allowed this evidence except in those cases where a defendant who moves for suppression of the material can show that his personal right of privacy was violated by the unlawful search or seizure. This restriction on persons who can suppress illegally acquired evidence has been attributed by some commentators⁵ to the fact that the constitutional right to suppress was at one time considered to stem in part from the Fifth Amendment's privilege against self-

³ We pointed out last Term that "a ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which procured the evidence, while the application of the exclusionary rule withholds the constitutional imprimatur." *Terry v. Ohio*, *supra*, n. 2, at 13. See *Irvine v. California*, *supra*, n. 2, at 150 (dissenting opinion).

⁴ See *People v. Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955).

⁵ Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 539, 540 (1963); Comment, 115 U. Pa. L. Rev. 1136, 1140-1141 (1967). Others have attributed the standing requirement simply to a hostility towards the exclusionary rule on the part of the courts. See, e. g., Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471 (1952).

incrimination.⁶ Only the person whose right has been violated can claim the protection of that privilege. 8 J. Wigmore, *Evidence* §§ 2196, 2270 (1940). But if the exclusionary rule follows from the Fourth Amendment itself, there is no basis for confining its invocation to persons whose right of privacy has been violated by an illegal search. The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons.⁷ Accordingly, commentators have urged that the necessary implication of the Fourth Amendment is that any defendant against whom illegally acquired evidence is offered, whether or not it was obtained in violation of his right to privacy, may have the evidence excluded. It is also contended that this is the only means to secure the observance of the Fourth Amendment.⁸

⁶ *Mapp v. Ohio*, 367 U. S. 643 (1961), was a 5 to 4 decision. My Brother BLACK concurred only on the basis that the Fifth Amendment's ban against self-incrimination, operating in conjunction with the Fourth Amendment, required the exclusionary rule. See also *Ker v. California*, 374 U. S. 23, 30 (1963); *Malloy v. Hogan*, 378 U. S. 1, 8 (1964).

⁷ The California Supreme Court has recognized that it is not inconsistent to hold that any person may object to the use against him of evidence obtained by an illegal search or seizure, while at the same time allowing only a person who has been made to incriminate himself to suppress his confession and its fruits. Compare *People v. Martin*, *supra*, n. 4, with *People v. Varum*, 66 Cal. 2d 808, 427 P. 2d 772 (1967).

⁸ See generally, Grant, *Circumventing the Fourth Amendment*, 14 So. Cal. L. Rev. 359, 368 (1941); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1, 22 (1950); Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. Ill. L. F. 78, 105. Traynor, *Mapp v. Ohio*

I find these arguments cogent and appealing. The Fourth Amendment is not merely a privilege accorded to him whose domain has been lawlessly invaded. It grants the individual a personal right, not to privacy, but to insist that the State utilize only lawful means of proceeding against him. And it is an assurance to all that the Government will exercise its formidable powers to arrest and to investigate only subject to the rule of law. See *Brinegar v. United States, supra*, at 181 (dissenting opinion)..

To allow anyone, regardless of "standing," to prevent the use against him of evidence that the Government has lawlessly obtained would, however, be contrary to a number of decisions stemming from *Jones v. United States, supra*. E. g., *Wong Sun v. United States, supra*; *Parman v. United States*, 399 F. 2d 559 (C. A. D. C. Cir. 1968). It is the mandate of *Jones* that something more than the generalized interest of any citizen in governmental obedience to law may be required for suppression of unlawfully obtained evidence. But if the Court is not prepared to repudiate the holding, stated in *Jones*, that something more must be shown to compel suppression than a claim of prejudice based only on "the use of evidence gathered as a consequence of a search or seizure directed at someone else," 362 U. S. 261, it should at least follow *Jones* faithfully and completely.

Jones represented a substantial step towards full implementation of the Fourth Amendment. The case involved

at Large in the Fifty States, Duke L. J. 319, 335, (1962); Broeder, *supra*, n. 5, at 540; Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 649-650, n. 352 (1968);²³ Comment, 58 Yale L. J. 144, 157 (1948); Comment, 1965 Wash. U. L. Q. 488; Comment, 34 U. Chi. L. Rev. 342 (1967). But see Edwards, *supra*, n. 5, at 472; Weeks, Standing to Object in the Field of Search and Seizure, 6 Ariz. L. Rev. 65 (1964); Comment, 55 Mich. L. Rev. 567, 581 (1957).

a charge of illegal possession of narcotics, and it held that mere lawful presence on the premises searched gave "standing" to challenge the legality of the search.⁹ It rejected the view "generally" held by courts of appeals "that the movant [must] claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched" in order to have the seized property suppressed. *Ibid.* It explicitly rejected the use of property concepts to determine whether the movant had the necessary "interest" or "standing" to obtain exclusion of the unlawfully seized evidence. See *id.*, at 266.

The Court said in *Jones*, in a passage the majority quotes but the full scope of which it does not incorporate in its opinion:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . . Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." (Emphasis supplied.)

It is my position that this quotation, read in light of the Court's rejection of property concepts, requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely "the

⁹ I assume that the Court today intends to incorporate at least this direct holding of *Jones*.

victim of an invasion of privacy"¹⁰ and a "person aggrieved," even though it is not his property that was searched or seized. As I think the Court recognized in *Jones*, unless we are to insist upon property concepts, it is enough to give him "standing" to object that the government agents conducted their unlawful search and seizure in order to obtain evidence to use against him. The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial. See *Rosencranz v. United States*, 334 F. 2d 738, 741 (C. A. 1st Cir. 1964) (concurring opinion).

¹⁰ Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211-225, provides that a law enforcement officer seeking prior judicial authorization for interception of wire or oral communications shall include, among other things, in his application to the court "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ." 82 Stat., at 218 (to be 18 U. S. C. § 2518 (1) (b)). Examination of such applications should facilitate the task of deciding at whom a particular investigation was directed. See also *Berger v. New York*, 388 U. S. 41, 55-59 (1967), in which we held that the Fourth Amendment requires, as a precondition of judicial authorization of an eavesdrop, that the conversations sought to be seized be described with particularity.

Although I have referred to relevant provisions of the Omnibus Crime Control and Safe Streets Act, I note that I have not considered the constitutionality of the Act, as that issue is not involved in this case. I express neither agreement nor disagreement with the majority's statements concerning the Act.

III.

I do not agree with the Court's decision that sensitive national security material that may not be relevant to defendant's prosecution must be turned over to the defendant or his counsel for their scrutiny. By the term "national security material," I mean to refer to a rigid and limited category. It would not include material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states.

Because the Court believes that no distinction can be made with respect to the defendant's right to suppress relevant evidence on the basis of the sensitivity of the material, it has concluded that no distinction can be made as to the method of determining whether the material is relevant. I agree that an *in camera* inspection of the records of unlawful surveillance should not be the usual method of determining relevance. I agree with all that the Court says about the inadequacy of an inspection in which the defendant cannot participate and the burden that it places upon the trial judge. But in cases where the trial court explicitly determines, in written findings, sealed and available for examination by reviewing courts, that disclosure would substantially injure national security interests, I do not think that disclosure to the defendant is necessary in order for the Government to proceed with a prosecution. The trial judge should make such findings only when the Attorney General has personally certified that specific portions of the unlawfully obtained materials are so sensitive that they should not be disclosed. But when such a determination is made, I believe that the trial judge may himself weed out the material that he deems to be clearly irrelevant and immaterial. The balance, of course, must

be turned over to the defendant or his counsel, unless the Government chooses instead to dismiss the prosecution.

Let me emphasize that the defendant's right to suppress is the same whether the charge is espionage, sabotage, or another kind of crime: Relevant material that has been illegally seized may be suppressed if the defendant has standing, but the existence of nonrelevant illegal evidence will not prevent a prosecution. Only the method of determining the relevance of the lawlessly obtained material to the prosecution would vary according to whether the national security is involved.

I agree with the majority that the possibility of error in determining relevance is much greater if there is only *in camera* examination. But I also agree with my Brother HARLAN that disclosure of some of the material may pose a serious danger to the national interest. I therefore reach the conclusion that a differentiation may properly be made between the method of handling materials the disclosure of which would endanger the national security and other illegally obtained materials. Skepticism as to the court's ability to detect and turn over to the defendant all relevant material may be well-founded, but *in camera* inspection does not so clearly threaten to deprive defendants of their constitutional rights that it justifies endangering the national security. Accordingly, I would hold that after certification by the Attorney General that specific portions of unlawfully obtained materials are sensitive, the trial judge may find that their disclosure to the defendant or his counsel would substantially injure national security interests, and he may determine *in camera* whether the materials are arguably relevant to the defendant's prosecution.